[redacted] 104

[redacted] PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

[redacted] MITCHELL, ADMINISTRATRIX OF THE ESTATE OF FRED T. MITCHELL, DECEASED.

[redacted] THE SUPREME COURT OF THE STATE OF [redacted]

[redacted]

(56,141)

(25,141)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 384.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ELLA HUXOLL, ADMINISTRATRIX OF THE ESTATE OF FRED J. HUXOLL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 No. 18377.

HUXOLL, Adm'x,
v.
UNION PACIFIC R. CO.

Pleas: Before the supreme court of the state of Nebraska, at a term thereof begun and holden at the capitol in the city of Lincoln, in said state on the 20th day of September, 1915.

Present:

Hon. Andrew M. Morrissey, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William B. Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:

H. C. LINDSAY, *Clerk*.

Be it remembered, That on the 14th day of November, 1913, there was filed in the office of the clerk of said supreme court a certain Transcript, in the words and figures following, to-wit:

2 Pleas: In the District Court Third Judicial District of Nebraska in and for the County of Lancaster at the September A. D. 1913 term of said Court begun and held in the City of Lincoln in said County and State on the 29th day of September in the year of our Lord One Thousand Nine Hundred and Thirteen and on a day therein to-wit: On the 24th day of October A. D. 1913 (that being the 22nd Judicial day of the September A. D. 1913 term of said court).

Present Honorable P. Jas. Cosgrave, Judge presiding. Gus A. Hyers, Sheriff and J. S. Baer, Clerk.

Be it remembered that at the several times hereinafter set forth were filed in the office of the Clerk of said Court papers of which the following are true and correct copies and proceedings were had and done in the cause below named as follows to-wit:

Petition.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Extate of Fred J. Huxoll, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff complains against the defendant and for cause of action says:

1. The plaintiff was heretofore and on or about the — day of ——, 1911, duly appointed Administratrix of the Estate of Fred J. Huxoll, deceased, by the County Court of Lincoln County Nebraska, and has duly qualified under such appointment and is now acting as such administratrix.

2. The defendant is a corporation organized under the laws of the State of Utah and owns and operates a line of railroad
3 from Council Bluffs in the State of Iowa to Ogden in the State of Utah which crosses the State of Nebraska from east to west and extends through the County of Cheyenne and the city of Sidney therein. The defendant is a common carrier of freight and passengers upon its said line of railroad and is engaged in Commerce between the several states and transports thereon persons and freight from points in Iowa to points in Nebraska and to points in other states westward from Nebraska.

3. Fred J. Huxoll, late of Lincoln County, Nebraska, was on the first day of January, 1911, and at the time of the injuries hereinafter complained of, a locomotive engineer in the employment and service of the defendant, operating locomotive engines which moved the defendant's trains in carrying goods and passengers from and between points in one state to points in other states and in commerce between the states, and said decedent was at the date aforesaid and at the time of receiving the injuries hereinafter complained of actually employed by the defendant in interstate commerce. The said Fred J. Huxoll died on or about the 2nd day of January, 1911 leaving surviving him Ella Huxoll, his widow, Marion Huxoll, a daughter, then aged two years and seven months, and Frederick A. Huxoll, a son, then aged one year and one month. By reason of the premises the defendant is liable to the plaintiff as Administratrix for the benefit of herself in her personal right as widow, and the said surviving children, for all damages caused by the fatal injuries suffered by said decedent resulting from the negligence of defendant, its officers, agents and employees, and its negligence in its engines, appliances, machinery, track, roadbed and rails, and other equipment hereinafter complained of, under and by virtue of an act of Congress approved April 22nd 1908, entitled "An act Relating to the Liability of Common Carriers by Railroad- to their employes in Certain Cases."

4. The defendant maintains at its station at Sidney, Ne-
4 braska Freight yards and terminal facilities, including a round house for the repair and housing of its locomotive engines, ash pits, coal chutes, water crane and car tracks, and said station is a division point of the freight service of defendant, at which engines and crews are changed. The defendant negligently located and constructed the said round house, wherein its locomotive engines are repaired and cared for, in close proximity to its main line track, and on the 1st day of January, 1911, was negligently maintaining and operating the same in close proximity to its said main line track and to its water crane and engine tracks, so that the smoke and steam incident to its maintenance and operation enveloped and obscured its engines and cars passing over said main line track and obstructed the view of engine and train movements thereon and upon the side tracks and engine tracks in near proximity thereto and to the said water crane, to the peril of its employes and servants working in and about the said yards.

5. The said Fred J. Huxoll was at about the hour of noon on the 1st day of January, 1911, in the due course of his employment and service, ordered and directed by the defendant to proceed to a point immediately adjacent to said main track and in near proximity to the water crane aforesaid, in its said yards at Sidney, to take in charge and operate one of the defendant's locomotive engines eastward from the station of Sidney to the siding called Perdue, for the purpose of moving from said Perdue to Sidney a freight train carrying interstate traffic, that had been stalled and was unable to proceed further by its own engine. The said Fred J. Huxoll, in obedience to said order and in discharge of the duties of his employment, and not otherwise, had proceeded to the defendant's wash house and dressing room provided for the use of its engineers, and had dressed suitably for the duties of said service, and had proceeded thence in the immediate vicinity of said round
5 house by the usual route and way provided for passage by defendant to the water crane, in close proximity to which the engine assigned to him was standing for the purpose of boarding and operating said engine, through a violent snowstorm, high wind and excessively cold weather. The defendant had negligently permitted an accumulation of ice about and in the vicinity of said water crane, and had negligently permitted the said water crane to become so out of repair that it permitted the escape of water on the ground, where it froze and rendered the way slippery and dangerous, making it necessary for deceased's own safety to make a slight detour in his course, and to cross on to the defendant's main line track. While so proceeding from the wash house to the point where the engine assigned to him was awaiting him, the whole course was enveloped in dark clouds of smoke and steam which the defendant negligently permitted to escape from the said round house so negligently located in close proximity to the said main track, water crane and engine track adjacent thereto, and by reason thereof the said deceased was unable to see or distinguish the approach or movement of engines and cars for any appreciable distance. While he was

passing around the accumulated ice about the said water crane, the defendant negligently and carelessly, and without warning, backed an ordinary road locomotive engine, which it was negligently and carelessly employing in the switching service at said yards, upon and over the said Fred J. Huxoll, and thereby inflicted grievous and fatal injuries upon his person, from which on the next following day, he died. The said road locomotive engine so negligently employed by the defendant in the said switching service which inflicted said fatal injuries, was so constructed that in moving backwards the view of the track was obstructed by a high and side water tank, the engines ordinarily employed in said switching service being of a construction that leaves the engineer a free and unobstructed view of the track ahead of him, whether moving forward or backward a narrow and retreating or sloping water tank being universally and ordinarily employed for that purpose. The
6 locomotive engines in general and common use in such switching service are also constructed with running boards on both ends and on both sides, where switchmen can be stationed for lookout and upon which persons on the ground may step in event of approach or impending collision with the engine. The said road locomotive engine with which defendant inflicted said fatal injuries, was not equipped either with a narrow and retreating water tank, nor with foot boards or running boards at either end or either side, and the same was negligently employed in said service, for which it was not suitable, or designed, or constructed, and the said Fred J. Huxoll was wholly without warning or knowledge of the employment thereof in said switching service. In the switching of engines and cars generally and particularly in the said yards at Sidney, the safety of defendant's employes and servants in and about said yards and those called there for any special service, required that a brakeman or servant be stationed in the front end of the head car or engine, for the purpose of keeping a lookout and warning the engineer and those upon the track, of the presence of danger by collision or otherwise, in time to be able to stop the movement of the engine or cars before colliding with any servant or other person in the yard, and in general and common practice a brakeman or other servant is so stationed for that purpose. In the movement of the engine which inflicted the fatal injuries complained of, no brakeman or other servant was placed at the rear of said engine to keep a lookout ahead, according to the movement of said engine, and no foot board or other place of rest was provided by said engine for that purpose, as is provided by the locomotive engines constructed for and in common use in the switching service but defendant negligently and carelessly failed to so station a servant to keep said lookout or to provide an engine suitably equipped therefor. The defendant at the time of said collision was negligently and carelessly operating said engine in said switching service at a needlessly high and dangerous rate of speed. Without any brake or other appliance with which to stop the same, the brake thereon being then broken, defective and out of repair, without any bell or other device to give warning of the approach thereof, the bell on said engine being

broken, defective and out of repair, with the curtain or blind covering the window of the cab of said engine so as to prevent the engineer and fireman in charge of said engine from seeing persons or objects in front thereof, and without ringing any bell or giving any other sigal or warning. In switching engines and cars in yards like those at Sidney, the safety of Defendant's employes
7 working in and about such yards and those called there for any special service, requires that each engine be so operated as to be able to stop within the distance the track is actually seen to be clear, and in general and common practice in switching operations, such engines are so operated and extra precautions are required and taken, in common and general practice, during foggy or stormy weather, and at points where the track is obscured by smoke and steam. In operating said engine at the time it inflicted said fatal injuries, the defendant and its engine crew in charge thereof negligently and carelessly failed to keep the said engine so under control as to be able to stop within the distance that the track was seen to be clear, and to the contrary negligently operated the same at so high a rate of speed that it could not be stopped within the distance the track ahead could be seen to be clear, nor within a distance of seventy feet beyond any point that could be seen by the engineer or fireman. At the time of said collision and the infliction of said fatal injuries the said Fred. J. Huxoll was exercising due care, and the said fatal injuries were inflicted and caused wholly by the aforesaid several acts of carelessness and neglect of the defendant, herein specified and enumerated.

6. At the time of his death, said Fred J. Huxoll was capable of earning, and was actually earning in his said employment of a locomotive engineer, the wages of Two Hundred Dollars per month, which he then, and previously thereto, devoted wholly to the support and maintenance of the plaintiff, his wife, and his said infant children, Marian and Frederick, and at and prior to the infliction of said fatal injuries he was an unusually strong rugged and vigerous man physically, and of the age of twenty-nine years only. By reason of the death of the said Fred J. Huxoll, his widow and his children have sustained a pecuniary loss injury and damage of the sum of Fifty Thousand Dollars ($50,000).

Wherefore, plaintiff prays judgment against the defendant for the sum of Fifty Thousand Dollars ($50,000) and costs of suit.

8 HOAGLAND & HOAGLAND,
STOUT & ROSE,
WILMER B. COMSTOCK,
Attorneys for Plaintiffs.

STATE OF NEBRASKA,
Douglas County, ss:

Halleck F. Rose, being first duly sworn, on his oath deposes and says:

I am one of the attorneys for the plaintiff in the above entitled action, duly authorized; that said plaintiff is now absent from the

County of Lancaster and from the County of Douglas, and I believe the facts stated in the above and foregoing petition to be true.

HALLECK F. ROSE.

Subscribed in my presence and sworn to before me this 22nd day of September, 1911.

[SEAL.]

K. M. ANDERSON,
Notary Public.

Endorsed: Doc. 47 No. 76—In District Court Lancaster County, Nebraska—Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff, vs. Union Pacific Railroad Company, Defendant. Clerk's office District Court Lancaster County, Nebraska, Filed Sep. 23, 1911. J. S. Baer, Clerk Dist. Court. Petition.

Demurrer.

In the District Court in and for Lancaster County, Nebraska.

ELLA HUXOLL, Adm'x of the Estate of Fred J. Huxoll, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Comes now the defendant, Union Pacific Railroad Company and demurs to the petition of the plaintiff heretofore filed in the
9 above entitled case, for the reason that said petition fails to state facts sufficient to constitute a cause of action against this defendant.

UNION PACIFIC RAILROAD COMPANY,
By EDSON RICH,
E. F. PETTIS,
JOHN A. SHEEAN,
Its Attorneys.

Endorsed: 47-76. In the district Court of Lancaster County Nebraska—Ella Huxoll, Adm'x of the estate of Fred J. Huxoll Deceased, Plaintiff, vs. Union Pacific Railroad Co., Defendant. Demurrer. Clerk's office District Court Lancaster County, Nebraska. Filed October 23, 1911. J. S. Baer, Clerk Dist. Court.

Journal Entry.

That on the 18th day of June A. D. 1912 (that being the 54th Judicial day of the April A. D. 1912 term of said Court) were had and done the following proceedings as appear upon Court Journal "60" at page 427 to-wit:

47/76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

This cause now comes on to be heard upon the demurrer of the defendant, demurring to the petition of the plaintiff herein and is submitted to the Court, on due consideration whereof the Court doth overrule the said demurrer, to which the defendant excepts, and hereby is allowed thirty days from this date within which to file answer herein.

Answer.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, deceased, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

10 Comes now defendant, Union Pacific Railroad Company, and for its answer to plaintiff's petition heretofore filed in the above entitled case, denies each and every allegation therein contained, except such as are hereinafter expressly admitted to be true.

2. The defendant admits its status as a corporation organized under and by virtue of the laws of the State of Utah, and as owning and operating a line of railroad, among other places, from Council Bluffs, in the State of Iowa, to Ogden, in the State of Utah, through the city of Sidney, Cheyenne County, Nebraska; and that at all times herein mentioned it was, and now is, a carrier of freight and passengers, among other places, between the points specified; and that it carries on interstate commerce, among other places, between points in the State of Iowa and points in the State of Nebraska; and it is further admitted that the deceased Fred J. Huxoll, was at the time of the accident in question a locomotive engineer in the service of this answering defendant, and that on the 2nd day of January, 1911, he died as the result of such accident, leaving as his survivors his widow, Ella Huxoll and the two children specified in the petition.

3. And it is further admitted that the defendant, Union Pacific Railroad Company, maintains at its station at Sidney, Nebraska freight yards and terminal facilities, including a roundhouse for the repair and housing of its locomotive engines, and including among other things incident to such yards, ash pits, coal chutes, water cranes and railroad tracks; and it is further admitted that the said station of Sidney, so far as freight service is concerned, is one of its division points at which engines and crews are shifted and changed in the regular course of the Company's business.

4. Further answering plaintiff's said petition, this defendant alleges that the injuries complained of therein were not due to any

negligence or want of care on the part of this answering defendant, and charges the fact to be that such injuries were the result of
11 the negligence of the deceased himself, approximately causing said injuries, and proximately contributing thereto.

5. Further answering, this defendant alleges that the risks and dangers, if any, attending the business in which the deceased at the time of the accident in question was engaged were incident to said business and were open and obvious to him and were such as were known to the deceased at that time, or would have been so known to him had he been in the exercise of ordinary care; and it is further alleged that such risks and dangers, if any, were assumed by the deceased at the time he entered the employ of this answering defendant, and were continuously being assumed by him up to and including the time of the accident.

6. And defendant further states that the deceased, at the time of the accident, was walking along one of the tracks in the Sidney yards, which was used in connection with the switching operations of said defendant, and it is further stated by way of defense that the movement of the engine that struck the said deceased was incidental to the business of railroading, as herein specified, and the risks and dangers of such operation, under the circumstances, were being assumed by the deceased at the time of the accident in question.

Wherefore, this defendant asks to be allowed to go hence with its costs herein expended.

UNION PACIFIC RAILROAD COMPANY,
By JOHN A. SHEEAN,
EDWARD F. PETTIS,
Its Attorneys.

STATE OF NEBRASKA,
County of Douglas, ss:

John A. Sheean, being first duly sworn, on his oath deposes and says that he is one of the duly authorized attorneys of Union Pacific Railroad Company, defendant in the above entitled case,
12 which is a corporation and for which reason he makes this verification; that he has read the foregoing answer, knows the contents thereof, and that the same are true as he verily believes.

JOHN A. SHEEAN.

Subscribed and sworn to before me and in my presence this 16th day of July, 1912.

[SEAL.] ARTHUR H. SCRIBNER,
Notary Public.

STATE OF NEBRASKA,
Lancaster County, ss:

E. F. Pettis, being first duly sworn on oath says he is attorney for above defendant which is a corporation for which reason he verifies this answer, as refiled by leave of Court to plaintiff's petition as

amended, that he has read the matters and facts in the foregoing answer contained and the same are true as he verily believes.

E. F. PETTIS.

Subscribed and sworn to before me Jan. 8, 1913.

[SEAL.] J. S. BAER, *Clerk Dist. Court*,
By W. C. BURCHAN, *Deputy*.

Endorsed: 47-76. In the District Court of Lancaster County, Nebraska—Ella Huxoll, Administratrix of the estate of Fred J. Huxoll, deceased, Plaintiff vs. Union Pacific Railroad Company, Defendant—Answer—Clerk's Office, District Court Lancaster County, Nebraska. Filed Jul. 17, 1812. J. S. Baer, Clerk Dist. Court—Clerk's Office District Court Lancaster County Nebraska Re-filed Jan. 8, 1913. J. S. Baer, Clerk Dist. Court.

Reply.

In the District Court of Lancaster County, Nebraska.

13 ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Comes now the plaintiff and in reply to the answer of the defendant heretofore filed herein, denies each and every allegation in said answer contained.

HOAGLAND & HOAGLAND,
STOUT & ROSE,
WILMER B. COMSTOCK,
Attorneys for Plaintiff.

Endorsed: 47-76 District Court, Lancaster County, Nebraska. Ella Huxoll, Administratrix, Plaintiff vs. Union Pacific Railroad Company, Defendant—Reply—Clerk's Office District Court Lancaster County, Nebraska—Filed Nov. 6, 1912. J. S. Baer, Clerk Dist. Court.

Motion for Leave to Amend Petition.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Comes now the plaintiff and moves the Court for leave to amend her petition filed in this court on the 23rd day of September,

1911, by interlining immediately after the word "speed" in the nineteenth line from the top of page 5 of said petition, the following words:

"Without any brake or other appliance with which to stop the same, the brake thereon being then broken, defective and out of repair, without any bell or other device to give warning of the approach thereof, the bell on said engine being broken, defective and out of repair, with the curtain or blind covering the window of the cab of said engine so as to prevent the engineer and fireman in charge of said engine from seeing persons or objects in front thereof, and without ringing any bell or giving any other signal or warning."

W. V. HOAGLAND,
STOUT & ROSE &
W. B. COMSTOCK,
Attorneys for Plaintiff.

The defendant hereby acknowledges receipt of a copy of the above and foregoing motion and consents to the amendment as requested therein.

Dated this 5th day of October, 1912.

UNION PACIFIC RAILROAD COMPANY,
By E. H. CROCKER,
EDSON RICH.

Endorsed: 47-76 Ella Huxoll Adm'x. vs. U. P. R. R. Co. Motion—Clerk's Office District Court Lancaster County, Nebraska Filed Nov. 6, 1912. J. S. Baer, Clerk Dist. Court.

Journal Entry.

That on the 11th day of November A. D. 1912 (that being the 30th Judicial day of the October A. D. 1912 term of said Court) were had and done the following proceedings as appear upon Court Journal "60" at page 639 to-wit:

47-76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Leave is hereby given defendant to plead to the amended petition herein by Saturday morning next.

15 *Journal Entry.*

That on the 30th day of November A. D. 1912 (That being the 46th Judicial day of the October A. D. 1912 term of said Court) were had and done the following proceedings as appear upon Court Journal "60" at page 688 to-wit:

47-76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

This cause now comes on to be heard upon the motion of the defendant to strike certain portions from the petition of the plaintiff herein and to require the plaintiff to elect and is submitted to the Court, on due consideration whereof, the Court doth overrule the said motion, to which the said defendant excepts, and is hereby given leave to file answer herein twenty days from this date.

Exceptions to Depositions.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix, etc., Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

Comes now the defendant and renews each separate and several objection made at the time of the taking of the deposition of B. R. Fletcher to each several question as it appears in said deposition and further excepts and objects as follows:

Defendant excepts and objects to question 32 for the reason that it is immaterial and irrelevant.

Excepts and objects to question 38 for the reason that the same is immaterial and irrelevant.

Excepts and objects to question 39 for the reason that the same is immaterial and irrelevant.

16 Excepts and objects to question 42 for the reason that the same is immaterial and irrelevant.

Excepts and objects to question 68 for the reason that the same is immaterial and irrelevant.

Excepts and objects to question 70 for the reason that the same is immaterial and irrelevant.

Excepts and moves to strike the answer to question 76 for the reason that the same was not responsive, was hearsay and a volunteer statement of the witness.

Excepts and moves to strike the answer to question 93 for the reason that it was not responsive, is immaterial and irrelevant and for the further reason that no foundation was laid permitting the witness to testify as to the alleged contents of the book.

Excepts and objects to question 95 for the reason that it was not responsive, is immaterial and irrelevant, and for the further reason that no foundation was laid permitting the witness to testify as to the alleged contents of the book.

Excepts and objects to question 96 for the reason that it was not responsive, is immaterial, and for the further reason that no founda-

tion was laid permitting the witness to testify as to the alleged contents of the book.

Excepts and objects to question 107 for the reason that there is no foundation laid, no knowledge shown in the witness, calls for a conclusion of the witness, is immaterial and not the best evidence.

Excepts and objects to question 109 for the reason that there is no foundation laid, no knowledge shown in the witness, calls for a conclusion of the witness, is immaterial, and not the best evidence.

Excepts and objects to question 113 as leading, suggestive calling for a conclusion, no foundation laid, and no knowledge shown in the witness, not the best evidence.

Excepts and objects to question 114 as immaterial and irrelevant, and not the best evidence.

17 Excepts and objects to question 115 as incompetent and immaterial, no foundation laid, no knowledge shown in the witness; moves to strike out answer to question 115 for the same reason, and not the best evidence.

Excepts and objects to question 116 for the reason that there is no foundation laid, no knowledge shown in the witness, immaterial, irrelevant, and not the best evidence. Moves to strike the answer to question 116 for the reasons stated in the objection.

Excepts and objects to question 117 as leading, calling for a conclusion, no foundation laid, no knowledge shown in the witness and not the best evidence.

Excepts and objects to question 119 for the reason that it is incompetent, no foundation laid, no knowledge shown in the witness leading, calls for conclusion and not the best evidence.

Excepts and objects to question 120 for the reason that it is incompetent, no foundation laid, no knowledge shown in the witness, leading, calls for conclusion, and not the best evidence.

Excepts and objects separately to Exhibits 1, 2, 3, 4, for the reason that each separate exhibit is immaterial, incompetent, no foundation laid, wholly irrelevant and not the best evidence; in this connection defendant moves to strike from the bottom of Exhibit 19 the following words: "Note—Name Armstrong evidently written after something had been erased" for the reason that the same is but a mere voluntary statement of the stenographer preparing said exhibit 19, was not true in fact, and no such words or words of similar import or meaning were upon the original of Exhibit 19.

Excepts and objects to question 132 as immaterial and calling for conclusion.

Excepts and objects to question 133 as immaterial and calling for conclusion.

Excepts and objects to question 140 as immaterial.

18 Excepts and objects to question 143 as immaterial, irrelevant no time fixed, no knowledge shown.

Excepts and moves to strike the answer to question 147 for the reason that it is not responsive.

Excepts and objects to question 150 as immaterial.

Excepts and objects to question 152 as leading, witness having previously answered that he didn't know.

Excepts and objects to question 153 for the reason that the same is immaterial, time referred to therein being subsequent to the happenings of the alleged accident, and is irrelevant.

Excepts and objects to question 157 as immaterial, and calls for a conclusion.

Excepts and objects to question 158 as immaterial, relating to a time subsequent to that of the happening of the alleged accident and to the actions of no party to this suit nor of plaintiff's intestate, as irrelevant, incompetent and leading defendant moves to strike out the answer for the reason stated in the objection.

Excepts and objects to question 159 as immaterial, relating to a time subsequent to that of the happening of the alleged accident and to the actions of no party to this suit, nor of plaintiff's intestate, irrelevant, incompetent, leading, calling for conclusion; defendant moves to strike out the answer for the reasons stated in the objection.

Excepts and objects to question 160 as immaterial, relating to a time subsequent to that of the happenings of the alleged accident and to the actions of no party to this suit nor of plaintiff's intestate, irrelevant, incompetent, leading, calling for a conclusion. Defendant moves to strike out the answer for the reason stated in the objection.

Excepts and objects to question 163 as immaterial, relating to the time subsequent to that of the happening of the alleged accident, and to the actions of no party to this suit nor of plaintiff's intestate, irrelevant, incompetent, leading, calling for a conclusion. Defendant moves to strike out the answer for the reason stated in the objection.

Excepts and objects to question 164 as immaterial, relating to a time subsequent to that of the happening of the alleged accident and to the actions of no party to this suit nor of plaintiff's intestate, irrelevant, incompetent, leading, calling for conclusion.

Excepts and moves to strike out the answer to question 165 as not responsive.

Excepts and objects to question 169 as leading, calling for a conclusion, no foundation laid, no knowledge shown in the witness.

Excepts and objects to question 169 as leading, calling for a conclusion, no foundation laid no knowledge shown in the witness.

Excepts and objects to question 170 for the reason that it is leading, suggestive, calls for a conclusion, no foundation laid no knowledge shown in the witness; moves to strike from the answer the following words: "Well, that is instructions" as not responsive, incompetent.

Excepts and objects to question 171 for the reason that the same is leading suggestive, calls for a conclusion, no foundation laid, refers to a time subsequent to the happening of the accident complained of, is immaterial and irrelevant and incompetent.

Excepts and objects to question 172 for the reason that there is no foundation laid, no knowledge shown in the witness, is immaterial and irrelevant, calls for a conclusion, assumes facts not proven.

Excepts and objects to question 173 as immaterial.

Excepts and objects to question 177 as immaterial. Defendant

moves to strike out the answer for the reason that the time is shown to be subsequent to the happening of the accident.

Excepts and objects to question 179 as leading, suggestive calling for a conclusion, no foundation laid, immaterial.

20 Defendant excepts and objects and moves to strike out Exhibit 6 for the reason that the same is not the best evidence, no foundation laid; it appearing that such order, if any was given was given long after the happening of the injury complained of and defendant further insists that Exhibit 6 attached to the deposition found on page 46 is not a true copy of the original paper it purports to be a copy of, and further objects that the same is immaterial, incompetent and irrelevant.

Exceptions to Deposition of William Hawley.

Comes now the defendant and makes the following objections and exceptions to the deposition of William Hawley.

Excepts and objects to question 10 for the reason that it calls for the conclusion of the witness, no foundation laid, or knowledge shown; moves to strike the answer for the same reason.

Excepts and objects to question 15 for the reason that no foundation laid, calls for a conclusion no knowledge shown.

Excepts and objects to question 16 for the reason that it assumes facts not proven and calls for a conclusion and is immaterial.

Excepts and objects to question 17 as calling for a conclusion immaterial, irrelevant.

Excepts and objects to question 19 for the reason no foundation laid, not the best evidence, and moves to strike the answer for the same reason.

Excepts and objects to question 22 for the reason no foundation laid, leading, calls for a conclusion, immaterial.

Excepts and objects to question 23 for the reason no foundation laid, leading calls for a conclusion, immaterial.

Defendant objects to Exhibit 7 being received in evidence for the reason that there is no foundation laid, incompetent, immaterial, and irrelevant, and moves to strike out all of the answer to question 25 except the words "Yes, sir" for the same reason.

21 Excepts and objects to question 33 as calling for a conclusion immaterial and irrelevant.

Objects to 34 no foundation calls for conclusion immaterial.

Defendant moves to strike from the answer to question 34 the following words: "Supposed to be given an hour and thirty minutes call" as not responsive stating a conclusion or supposition of the witness and not a fact.

Defendant moves to strike from the answer to question 36 the following words: "They are supposed to be on duty thirty minutes before leaving time" as stating a supposition or conclusion of the witness and not a fact, not responsive to the question, immaterial, and irrelevant.

Excepts and objects to question 38 as immaterial.

Excepts and objects to question 39 as immaterial, further as leading assuming facts not proved, calling for a conclusion, incompetent.

Excepts and objects to question 40 as immaterial.

Excepts and objects to question 41 as immaterial; moves to strike out the answer as not responsive.

Excepts and objects to question 42 as immaterial, no foundation laid, not the best evidence, hearsay, no authenticity of the alleged record being shown.

Excepts and objects to question 55 as immaterial, no foundation laid, not the best evidence, hearsay, no authenticity of the alleged record being shown, and for the further reason that it is leading, and calls for conclusion: moves to strike the answer out for the reason that the same is not responsive and is not the best evidence, and immaterial.

Defendant objects to the offer made by plaintiff of part of an alleged Dispatcher's train sheet of Sunday January 1, 1911 said offer immediately following the answer to question 55 for the reason that the same is immaterial, incompetent, no foundation laid, not
22 the best evidence, hearsay. Defendant moves to strike out the offer as the same appears at the bottom of page 25 of Hawley's deposition beginning with the words "heading at top" and ending with the words "Office at Purdue" and all inclusive for the same reasons stated in the objections to the offer.

Excepts and objects to question 60 as immaterial, incompetent, no foundation for use of the records having been laid.

Excepts and objects to question 62 as leading, calling for conclusion.

Excepts and objects to question 63 as immaterial, no foundation laid for the witness testifying from the alleged train sheets, incompetent and irrelevant. Defendant moves to strike from the answer all except the words "I think so" for the reason that the same is immaterial, not responsive to the question, a mere voluntary statement of the witness.

Excepts and objects to question 64 as immaterial, and no foundation laid for testifying from the alleged train sheets.

Excepts and objects to question 65 as immaterial; no foundation laid for the use of the alleged train sheets.

Excepts and objects to question 71 as immaterial, no foundation laid, calls for conclusion.

Excepts and objects to question 72 as immaterial, no foundation laid, calls for conclusion.

Excepts and objects to question 75 for the reason that it assumes witness had stated how many times Huxoll was out, and for the further reason that it was immaterial.

Excepts and objects to question 77 no foundation laid, no knowledge shown in the witness, immaterial; objects to the offer following the question and answer 82 as not the best evidence, no foundation laid, hearsay, immaterial, incompetent and irrelevant and moves to strike from the deposition what purports to be a copy of order No. 36 for the same reasons.

23 Excepts and objects to question 90 as immaterial; moves to strike from the answer thereto all except the words "I be-

lieve they did" for the reason that it is not responsive, but a voluntary statement of the witness.

Excepts and objects to question 91 as immaterial.

Excepts and objects to question 92 as calling for a conclusion assuming a state of facts not proven.

Excepts and objects to question 93 and moves to strike out answer thereto as question is immaterial not the best evidence and the answer thereto shows that it was referring to a past occurrence.

Excepts and objects to question 94 for the reason that there is no foundation laid for the use of the alleged train sheet itself is not the best evidence, hearsay, and defendant moves to strike out the answer for the same reasons.

Defendant objects to the offer of Exhibit 7 and moves to strike the same from the deposition for the reason that there is no foundation laid, not the best evidence, hearsay, immaterial, incompetent and irrelevant.

Excepts and objects to question 97 for the reason that there is no foundation laid, incompetent.

Excepts and objects to question 98 for the reason that there is no foundation laid, incompetent.

Excepts and objects to question 99 as leading calling for a conclusion, no foundation laid.

Excepts and objects to question 100 as leading calling for a conclusion, no foundation laid.

Excepts and objects to question 102 in so far as it undertakes to define Exhibit 12 as leading, no foundation laid, incompetent, irrelevant and immaterial.

Excepts and objects to the offer of Exhibit 12 for the reason that there is no foundation laid, is hearsay, incompetent, immaterial and irrelevant.

24 Excepts and objects to question 107 as not the best evidence and moves to strike the answer there-from for the reason that there is no foundation laid for the witness testifying from the alleged record or for the use of the alleged record itself.

Defendant excepts and objects to the offer of Exhibit 10 and moves to strike the same from the deposition for the reason that there is no foundation laid for the introduction of the exhibit, not the best evidence, hearsay, immaterial, incompetent and irrelevant.

Excepts and objects to question 109 as assuming something not proven, as being an attempt to read *under* the record purported portion of an alleged record no foundation having been laid for the use of the record itself.

Excepts and objects to question 125 as assuming a state of facts not proven, is immaterial, no definite time being fixed with relation to the time of the accident.

Excepts and objects to question 126 as assuming a state of fact not proven, is immaterial, no definite time being fixed with relation to the time of the accident.

Excepts and objects to question 133 in that it assumes that defendant has a "regular slow order book" the fact not being proven it is immaterial.

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Defendant objects to the offer of Exhibit 13 and moves to strike the same from the deposition for the reason that the same is incompetent, immaterial and irrelevant, no foundation laid for its introduction or the introduction of the original of which it purports to be a copy, no authenticity shown.

Excepts and objects to question 146 as no foundation laid, assuming a state of facts not proven.

Excepts and objects to question 147 as assuming a state of facts not proven, no foundation laid, no authenticity of the al-
25 leged manifests or records shown, incompetent and irrelevant; moves to strike the answer out for the same reason.

Excepts and objects to question 148 for the reason that there is no foundation laid, no knowledge shown in the witness, and calls for a conclusion; moves to strike from the answer the words "The only one" not responsive and states a conclusion.

Excepts and objects to question 150 as leading, suggestive calling for a conclusion, no knowledge shown, in the witness, incompetent, and immaterial.

Moves to strike out the answer to question 151 as not responsive.

Withdraws question 152 for the reason that the same as written out by the notary and stenographer is unintelligible and meaningless.

Excepts and objects to question 165 for the reason that there is no foundation laid, no knowledge shown in the witness as to the alleged facts inquired about.

Excepts and objects to question 166 as immaterial.

Excepts and objects to question 170 for the reason that there is no foundation laid, as calling for a conclusion; moves to strike the answer out for the same reasons.

Excepts and objects to question 171 as leading.

Excepts and objects to question 172 as leading, no foundation laid, no knowledge shown in the witness as to the alleged fact inquired about.

Excepts and objects to question 173 as not the best evidence assuming a state of facts not proven.

Objects separately to the offer of Exhibit 15 and 16 for the reason that they are each incompetent, no foundation laid, no proof of genuineness shown, immaterial.

Excepts and objects to Exhibit 17 for the same reasons last
26 given.

Excepts and objects to Exhibit 18 for the same reasons last given.

Excepts and objects to Exhibit 19 for the same reason last given.

Excepts and objects to question 177 as immaterial.

Excepts and objects to question 180 as leading, calling for a conclusion.

Excepts and objects to question 183 as immaterial.

Excepts and objects to question 184 as immaterial.

Excepts and objects to question 186 as immaterial.

Excepts and objects to question 207 as immaterial.

Excepts and objects to question 215 as immaterial, as cross ex-

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amining his own witness, is incompetent assuming a state of facts not proven to exist.

Excepts and objects to question 223 on the ground that there was no foundation laid, no knowledge shown in the witness to testify as to the alleged fact.

Excepts and objects to question 226 for the same reasons.

Defendant separately excepts and objects to Exhibit- 1, 2, 3, 4, 5, for the reasons separately that there was no foundation laid for the introduction of the respective exhibits, incompetent, immaterial, no proof of genuineness being offered.

Excepts and objects to Exhibits 12, 15, 17, 18, 19, each separately for the same reasons given above.

Exceptions to Deposition of Thomas Orton.

Defendant excepts and objects to question 6 for the reason that it assumes a state of facts not proven.

Excepts and objects to question 10 as immaterial; moves to strike from the answer the following "I am not sure whether this train was at Purdue or Julesburg, but we were called to go down double header light" as not responsive to the question, a mere volunteer statement of the witness.

27 Excepts and objects to question 25 and moves to strike from the answer the following words: "The wind was blowing from a northeasterly direction—I do not know whether it was directly north or not a very strong wind" as not responsive, a mere volunteer statement of the witness.

Excepts and objects to question 28 as leading and suggestive.

Excepts and objects to question 29; moves to strike from the answer the following words: "When the wind struck the steam" as not responsive to the question, a mere volunteer statement of the witness.

Excepts and objects to question 34 as leading, suggestive, calling for a conclusion, no place being fixed in the question and is vague and indefinite; moves to strike from the answer the following words: "A little farther west it wasn't so bad" as not responsive, being a mere volunteer statement of the witness.

Excepts and objects to question 36 as immaterial.

Moves to strike from the answer to question 41 the following "Of course there was more or less water spilt from taking water out of this crane and of course we had had nice weather up until this time." Is not responsive to the question, a mere volunteer statement of the witness.

Renews the objection to question 42 and adds the same was leading, suggestive, and calls for a conclusion. Moves to strike out the answer to question 42 for the reason that it is argumentative and not responsive, states the conclusion of the witness not a fact, and contains an assumption of fact not proven.

Renews the objection to question 43; moves to strike the answer out for the reason that it is argumentative, is not responsive and contains an assumption of fact not proven.

Excepts and objects to question 45 for the reason that it is argumentative, calls for the opinion and conclusion of the witness, not for a fact, and assumes facts not proven, is immaterial, ir-
28 relevant, and incompetent; moves to strike out the answer for the reason that it is argumentative, is not statement of fact but a mere opinion and conclusion of the witness, is irrelevant and incompetent.

Excepts and objects to question 51 as immaterial and irrelevant; moves to strike the entire answer out upon the ground that it is argumentative and states an opinion or conclusion of the witness rather than a fact, is not responsive.

Moves to strike out the answer to question 53 on the ground that it is not responsive.

Moves to strike out the answer to question 59 on the ground that it is not responsive, is vague, indefinite, and argumentative.

Moves to strike from the answer to question 63 the following "Was wedged under the brake rod and hangers of the left driver" as not responsive to the question, a mere volunteer statement of the witness.

Moves to strike from the answer to question 65 the following words "And there were plenty others to take him" as not responsive to the question, a mere volunteer statement of the witness.

Excepts and objects to question 73 on the ground that it is leading.

Renews the objection to question 75 and adds the further ground no foundation laid.

Renews the objection to question 76 and adds thereto no proper foundation laid.

Moves to strike from the answer to question 77 the following words "The substance was that he thought Zimmer was going pretty fast" as incompetent irrelevant and immaterial, hearsay, not a part of the res gestæ, that it states a conclusion of the witness as to what Huxoll said rather than his words, and the question asked having been previously answered in the first part of the answer, the words moved against are but the volunteer statements of the wit-
ness.

29 Excepts and objects to question 85 as immaterial.

Excepts and objects to question 86 for the reason that no foundation is laid, assuming a state of facts not proven, not the best evidence, calling for a conclusion; moves to strike the answer out for the same reasons.

Excepts and objects to question 87 for the reason last above given.

Renews the objection to question 91 and adds thereto that there was no proper foundation laid.

Renews the objection to question 93 and adds thereto that it calls for conclusion, no proper foundation laid, and further the question is not limited to the time before or at the time of the happening of the accident.

Excepts and objects to all of question 94 except the following "That bulletin should have been dated when" for the reason that the balance of said question is incompetent, assumes a state of facts

not shown to have existed—the time referred to not being limited to a time prior to or at the happening of the accident, no foundation laid, moves to strike the answer out as not responsive, and for the further reason, that assuming the answer to be true, it does not fix the time as prior to or at the happening of the accident.

Exceptions to Deposition of Arthur Devine.

Moves to strike from the answer to question 7 all except the following; "I take the engines generally out of the house" for the reason that the same is not responsive and is a volunteer statement of the witness.

Excepts and objects to question 12 as immaterial; moves to strike from the answer the following words; "It was so foggy and steamy I was using my own judgment" for the reason that the same is not responsive, is mere vo*ent*eer statement of the witness.

Renews the objection to question 13 and adds thereto the reasons that calls for a conclusion, no proper foundation laid moves to strike the answer out as not responsive.

Excepts and objects to question 25 as immaterial.

Moves to strike out the answer to question 15 as not responsive, and further that it is a volunteer statement of the witness.

Excepts and objects to question 24 as immaterial, no knowledge shown in the witness to testify as to the fact inquired about incompetent.

Renews the objection to question 29 and is too remote assumes facts not proven.

Exceptions to Deposition of A. J. Nicholson.

Excepts and objects to question 22 as being vague and indefinite no place fixed, no time fixed, and assuming a state of facts not proven; moves to strike the answer out for the same reasons.

Excepts and objects to question 23 as immaterial.

Excepts and objects to question 24 as immaterial.

Excepts and objects to question 25 as immaterial.

Excepts and objects to question 26 as immaterial.

Excepts and objects to question 30 for the reason that there is no foundation laid; moves to strike from the answer the following "and four or five engines in the vicinity of the ash pits and coal chutes" as not responsive, a volunteer statement of the witness.

Excepts and objects to question 31 as leading, calling for a conclusion.

Excepts and objects to question 32 as leading, calling for a conclusion.

Excepts and objects to question 34 as leading calling for a conclusion.

Moves to strike out the answer to question 35 as not responsive. Excepts and objects to question 35 as immaterial.

Excepts and objects to question 42 as leading and suggestive; moves

to strike from the answer thereto; "It all depends on when
31 the wind would whip the steam down" as not responsive, a mere volunteer statement of the witness and stating a conclusion.

Moves to strike out the entire answer to question 42 as not responsive, argumentative.

Exceptions to the Deposition of William Riggs.

Excepts and objects to question 7 as immaterial.

Moves to strike from the answer to question 8 all except the words "Freight engine" as not responsive, a mere volunteer statement of the witness.

Renews the objection to question 9 and adds that it is leading suggestive, and assumes a state of facts not proven, no proper foundation laid.

Renews the objections to question 10.

Renews the objection to question 11 and adds thereto the reason no proper foundation laid.

Renews the objection to question 13 and adds that it calls for a conclusion, no foundation laid; moves to strike from the answer the following words "The conditions of the weather were such the engines were more or less frozen up" for the reason that the same is not responsive, states a conclusion of the witness, is argumentative.

Renews the objection to question 16, and adds no proper foundation laid, calls for a conclusion; moves to strike the answer out for the same reason.

Excepts and objects to question 17 as immaterial.

Renews the objection to question 18.

Objects and excepts to question 20 as an attempt to cross examine his own witness and brow-beat him and further that it is leading and suggestive .

Excepts and objects to question 24 as immaterial.

Excepts and objects to question 25 as immaterial.

Excepts and objects to question 26 as immaterial.

32 Excepts and objects to question 27 as immaterial.

Excepts and objects to question 29 as immaterial.

Excepts and objects to question 30 as immaterial.

Excepts and objects to question 31 as immaterial; moves to strike from the answer all except "I could not say, I paid no attention," for the reason that the balance is not responsive and states a conclusion of the witness, and is a volunteer statement.

Excepts and objects to question 32 as immaterial and irrelevant and further that it assumes a state of facts not proven; moves to strike from the answer thereto the words "Equipped with foot boards" for the reason that the same is not responsive, a mere volunteer statement of the witness.

Excepts and objects to question 33 as immaterial and irrelevant leading, no proper foundation laid.

Excepts and objects to question 35 as immaterial, and irrelevant,

and for the further reason that it assumes a state of facts not proven, calls for a conclusion, and is an attempt to cross examine his own witness.

Excepts and objects to question 36 as immaterial and irrelevant and for the further reason that it assumes a state of facts not proven, calls for a conclusion, and is an attempt to cross examine his own witness; moves to strike the answer out as not responsive states a conclusion of the witness, and is a mere volunteer statement.

Excepts and objects to question 37 as immaterial, and cross examining his own witness.

Excepts and objects to question 38 as immaterial and irrelevant moves to strike from the answer all except "I can't say—occasionally we used a road engine" for the reason that the balance of the answer was not responsive and states a conclusion of the witness, and is a mere volunteer statement.

Excepts and objects to question 43 as leading.

Excepts and objects to question 49 as immaterial.

33 Excepts and objects to question 50 as immaterial.

Excepts and objects to question 51 as immaterial; moves to strike the answer out as not responsive and is incompetent, not appearing to be given as a matter of the witness' own knowledge.

Moves to strike from the answer to question 64 the following words, "We could not see anything" for the reason that the same is not responsive, and is a volunteer statement of the witness.

Excepts and objects to question 70 as leading, suggestive and as immaterial.

Excepts and objects to question 81 as immaterial, and as leading, calling for a conclusion and no proper foundation laid.

Excepts and objects to question 82 as immaterial and as leading moves to strike the answer out as not responsive.

Excepts and objects to question 83 as leading, suggestive, calling for a conclusion, no foundation laid.

Moves to strike out from the answer to question 85 the following words: "It was in the steam" as not responsive, a mere volunteer statement of the witness.

Renews the objection to question 86 and adds the reason no proper foundation laid.

Renews the objection to question 87 and adds, no proper foundation laid, leading and assumes a state of facts not proven; moves to strike the answer out for the reason that it does not purport to state the knowledge of the witness.

Renews the objection to question 88 and adds that it is leading, calls for a conclusion; moves to strike the answer out as not responsive and not purporting to state a matter of the witness' knowledge.

Moves to strike from the answer to question 94 the following words "In the steam" for the reason that it is not responsive, it is a mere volunteer statement of the witness.

34 *Exceptions and Objections to the Depositions of George Trexler.*

Excepts and objects to question 17 as immaterial.

Excepts and objects to question 18 as immaterial.

Excepts and objects to question 19 as immaterial, irrelevant no time fixed, vague and indefinite.

Excepts and objects to question 20 as immaterial.

Excepts and objects to question 21 as leading, calling for a conclusion, no proper foundation laid.

Renews the objection to question 24 made at the time the deposition was taken, and for the further reason that it assumes a state of facts not proven.

Renews the objection to question 24 made at the time *of* the detaking of the deposition, and moves to strike the answer out as immaterial, irrelevant, clearly showing when taken in connection with questions 25 and 26 immediately preceding and question 27, that the answer of the witness was a volunteer statement, and was not responsive, and as incompetent, not being a part of the res gestæ.

Excepts and objects to question 32 as no proper foundation laid, immaterial and irrelevant.

Excepts and objects to question 34 as leading suggestive and immaterial.

Excepts and objects to question 35 as assuming that there was a hollow of the hill, as leading, suggestive, immaterial, and irrelevant.

Excepts and objects to question 36 as leading and suggestive no proper foundation laid, immaterial and irrelevant, calling for a conclusion.

Excepts and objects to question 37 as leading, suggestive calling for conclusion, no proper foundation laid.

Excepts and objects to question 38 as assuming that there were rules of the company relative to the handling of switch
35 engines, no proper foundation laid, calling for a conclusion, immaterial leading suggestive and not the best of evidence; moves to strike from the answer all except the words "In a general way" for the reason that it is not the best evidence, and states the conclusion of the witness, and is not responsive.

Excepts and objects to question 39 as assuming a state of facts not proven, immaterial and irrelevant.

Renews the objection to question 40 and adds that it assumes a state of facts not prove-.

Excepts and objects to question 42 as immaterial and irrelevant, leading and suggestive.

Renews the objection to question 43 and adds thereto that it calls not for a fact but for a supposition, is leading and suggestive; moves to strike the answer out because it states no fact, but a conclusion of the witness.

Renews the objection to question 44 and moves to strike the

answer out for the reason that no proper foundation is shown and states a conclusion of the witness.

Renews the objection to question 45 as made at the time of taking the deposition and adds thereto that it assumes a state of facts not proven; moves to strike the answer out as not responsive.

Renews the objection to question 49 and adds that it assumes facts not proven; moves to strike from the answer "There has been a change there and it would be necessary to cross the spot tracks now" as a mere voluntary statement of the witness not responsive to any question.

Renews the objection to question 53 and adds thereto that it assumes facts that existed only in counsel's imagination no proof of the existence of such alleged facts having been made; moves to strike the answer out for the reason that it states a conclusion of the witness, his opinion, that it is immaterial and irrelevant.

Excepts and objects to question 53 as no foundation laid,
36 calling for a conclusion, irrelevant and immaterial, leading and suggestive; moves to strike the answer out for the reason that there is no knowledge shown in the witness, is immaterial and irrelevant.

Renews objection to question 54 and adds that it is leading moves to strike from the answer all except the word "yes" as stating a conclusion of the witness, not responsive, a mere volunteer statement of the witness, and immaterial and irrelevant.

Excepts and objects to question 55 for the reason that there is no proper foundation laid, calling for a conclusion, leading suggestive, immaterial and irrelevant.

Exceptions to Depositions of Roscoe Zimmer.

Renews the objection to question 10 made at the time of taking the deposition, and moves to strike the answer out as not responsive, the question, if proper, admitting of but a positive or negative answer.

Renews the objection to question 12 and adds thereto that it assumes a state of facts not proven, moves to strike from the answer all except the words "Not as I know of" and "I am not sure" as not responsive and being a mere voluntary statement of the witness.

Excepts and objects to question 13 as immaterial and calls for a conclusion and assumes facts not proven.

Renews objections to question 14 and adds that it is leading suggestive, calls for a conclusion, no proper foundation laid and assuming a state of facts not proven; moves to strike the answer out as immaterial and no knowledge shown in the witness.

Excepts and objects to question 15 as assuming facts not in evidence and immaterial; moves to strike the answer out as not responsive.

Excepts and objects to question 16 as leading, irrelevant and immaterial.

Excepts and objects to question 17 as leading, suggestive,
37 no proper foundation laid, immaterial and irrelevant.

Renews objection to question 18.

Excepts and objects to question 20 as immaterial, assuming facts not in evidence, leading and suggestive.

Renews the objection to question 21 and adds that it assumes facts not in evidence, is irrelevant.

Moves to strike from the answer to question 24 all except the words "I can't say" for the reason that the balance is not responsive, is a mere volunteer statement of the witness.

Excepts and objects to question 25 as leading, suggestive and calling for a conclusion.

Excepts to question 30 as leading, suggestive, no proper foundation laid, cross examining his own witness; moves to strike from the answer to question 55 the following words "I never know where they are goin'" as not responsive but a volunteer statement of the witness.

Excepts and objects to question 57 as immaterial and irrelevant.

Excepts and objects to question 58 as immaterial and irrelevant.

Excepts and objects to question 59 as leading, suggestive calling for a conclusion of the witness, cross examining his own witness, immaterial and irrelevant; moves to strike the answer out as immaterial, not responsive to the question, a mere volunteer statement of the witness.

Moves to strike from the answer to question 62 the following "The north curtain was fastened down on the engine" as not responsive, a mere volunteer statement of the witness; moves to strike from the same answer the following words; "He stuck his head in and said You have run over a man'" as not responsive, a mere volunteer statement of the witness.

Excepts and objects to question 66 as leading, suggestive, calling for a conclusion of the witness.

Excepts and objects to question 67 as leading, cross ex-
38 amining his own witness, an attempt to impeach his own witness, incompetent, immaterial, and irrelevant; moves to strike the answer out to question 67 as not responsive.

Excepts and objects to question 69 as leading and suggestive.

Excepts and objects to question 70 as leading, suggestive, incompetent, immaterial and irrelevant.

Excepts and objects to question 74 as immaterial, no foundation laid, question not fairly worded in that it contains no reference to the conditions alleged to have been existing at the time of the injury.

Excepts and objects to question 76 as immaterial.

Excepts and objects to question 77 as leading, suggestive, calling for a conclusion, and no proper foundation laid.

Excepts and objects to question 78 for the same reason last above stated.

UNION PACIFIC RAILROAD COMPANY,
By E. F. PETTIS, *Its Att'y.*

Endorsed: 47-76. Huxoll v. Union Pacific R. R. Co.—Exceptions to depositions of Fletcher, Hawley, Orton, Devine, Nicholson, Riggs,

Trexler, Zimmer—Clerk's Office District Court, Lancaster County, Nebraska—Filed Feb. 19, 1913. J. S. Baer, Clerk Dist. Court.

39 *Amendment to Answer.*

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Comes now the defendant and by leave of court this day had, filed herein this amendment to its answer, adding to its original answer the following allegations;

Defendant further answering and for answer to that portion of the plaintiff's petition, this day by leave of Court, attached to and incorporated in said petition, and denies each and every allegation contained in the allegations in said amendment. And defendant further alleges and says that the alleged acts of negligence set out in the said amendment, were not charged against the defendant or any action based thereon against the defendant for more than two years after the time said alleged acts of negligence are charged to have occurred.

E. C. STRODE.
B. W. SCANDRETT.

STATE OF NEBRASKA,
Lancaster County, ss:

B. W. Scandrett, being first duly sworn upon oath says that he is one of the attorneys for the defendant a corporation; that he has read over the foregoing amendment to the answer of the defendant corporation, and that the matters and facts therein stated are true as he verily believes.

B. W. SCANDRETT.

Subscribed in my presence and sworn to before me, this 16th day of October, 1913.

[SEAL.] J. S. BAER,
Clerk Dist. Court,
By W. C. BURCHAM, *Deputy.*

40 Endorsed: 47-76. Huxoll vs. U. P. R. R. Co. Amendment to Answer—Clerk's Office District Court Lancaster County, Nebraska. Filed Oct. 16, 1913. J. S. Baer, Clerk Dist. Court.

Special Interrogatory Submitted by Defendant.

In the District Court of Lancaster County, Nebraska.

ELLA B. HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

1. If you find for the plaintiff then state what amount you deduct from the total damage on account of the contributory negligence if any of the deceased, Fred Huxoll.

Ans. —.

Refused. Def't excepts.

Endorsed: 47-76—District Court Lancaster County, Nebraska—Ella Huxoll, Adm'x vs. Union Pacific R. R. Co.—Request for Special Finding—Clerk's Office District Court Lancaster County Nebraska—Filed Oct. 23, 1913, J. S. Baer, Clerk Dist. Court.

Instruction No. 1 Requested by the Defendant.

You are instructed to return a verdict in favor of the defendant.

Refused. Def't excepts.

Instruction No. 2 Requested by the Defendant.

You are instructed that as this action is brought under an Act of Congress approved April 22nd, 1908, entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," and as the undisputed evidence and stipulations of parties show that the deceased, Fred Huxoll, was not engaged in interstate commerce at the time he received the injuries which resulted in his death, your verdict must be for the defendant.

41

Refused. Def't excepts.

Instruction No. 3 Requested by the Defendant.

You are instructed that the undisputed evidence in this case shows that Fred Huxoll's death was the direct result of his walking down the main line track into a cloud of steam that was so dense that he knew he could not see an engine, if one approached, in time to avoid being struck by it, and when he also knew that said steam would prevent his being seen by those in charge of any engine which might approach, and that your verdict must be for the defendant.

Refused. Def't excepts.

Instruction No. 4 Requested by the Defendant.

You are instructed that Fred Huxoll was guilty of contributory negligence in walking down the main track through the steam when a safe way was open to him and that such negligence on his part was the proximate cause of his death, and that your verdict must be for the defendant.

Refused. Def't excepts.

Instruction No. 5 Requested by the Defendant.

You are instructed that the undisputed evidence in this case shows that the proximate cause of Fred Huxoll's death was his own negligence in walking down the main track through the steam when a safe way was open to him, and that if the act of Congress under which this action is brought, should be construed so as to permit a recovery in this case, it would deprive this defendant of its property without due process of law and be in conflict with the fourteenth amendment to the Constitution of the United States.

Refused. Def't excepts.

Instruction No. 6 Requested by the Defendant.

You are instructed that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or
42 in part by the failure of the defendant to comply with any Act of Congress enacted for the safety of employees.

Refused. Def't excepts.

Instruction No. 7 Requested by Defendant.

You are instructed that there is no evidence in this case tending to show that the defendant was negligent in locating its roundhouse at the point where it was located on January 1st, 1911, and that that charge of negligence contained in plaintiff's petition is withdrawn from your consideration.

Refused. Def't excepts.

Instructions No. 8 Requested by the Defendant.

You are instructed that there is no evidenec in this case tending to show that the defendant was negligent in permitting clouds of smoke and steam to escape from its roundhouse at Sidney on January 1st, 1911, and that that charge of negligence contained in the plaintiff's petition is withdrawn from your consideration.

Refused. Def't excepts.

Instruction No. 9 Requested by the Defendant.

You are instructed that there is no evidence in this case tending to show that the defendant had negligently permitted the water

crane referred to in the plaintiff's petition to become so out of repair that it permitted the escape of water on the ground, and that that charge of negligence contained in plaintiff's petition is withdrawn from your consideration.

Refused. Def't excepts.

Instruction No. 10 *Requested by the Defendant.*

You are instructed that there is no evidence in this case tending to show that the defendant had negligently permitted an accumulation of ice about and in the vicinity of the water crane referred to in the plaintiff's petition and that that charge of negligence contained in said petition is withdrawn from your consideration.

Refused. Def't excepts.

43 *Instruction No.* 11 *Requested by the Defendant.*

You are instructed that there is no evidence in this case tending to show that the defendant was negligent in using engine 213 in the switching service at Sidney on January 1st, 1911, instead of an engine of another type and that charge of negligence contained in the plaintiff's petition is withdrawn from your consideration.

Refused. Def't excepts.

Instruction No. 12 *Requested by Defendant.*

Even if you should find and believe from the evidence that some ice had been permitted to accumulate around the water crane involved in this case, still you could not find a verdict against the defendant because it had permitted said ice to accumulate as no evidence has been introduced in this case, tending to show that Fred Huxoll's death was caused in whole or in part by the fact that said ice has been permitted to accumulate.

Refused. Def't excepts.

Instruction No. 13 *Requested by the Defendant.*

You are instructed that you cannot find a verdict against the defendant on the ground that it negligently used engine 213 in the switching service on January 1st, 1911, instead of a different type of engine, for the reason that there is no evidence in this case tending to show that if a different type of engine had been used Fred Huxoll could have seen said engine approaching of the employees on said engine could have seen Fred Huxoll in time to have averted the accident, or that the death of Fred Huxoll was caused in whole or in part by the failure of the defendent to use a different type of engine.

Refused. Def't excepts.

Instruction No. 14 *Requested by the Defendant.*

You are instructed that there is no evidence in this case tending to show that there was a general custom in vogue in the yards at Sidney, of having a switchman on the forward end of a switch engine for the purpose of keeping a lookout and warning
44 the engineer and those upon the track of the presence of danger and that you cannot find a verdict against the defendant on the ground that such a custom did exist and was not being followed by the defendant at the time Huxoll received the injuries which resulted in his death.

Refused. Def't excepts.

Instruction No. 15 *Requested by the Defendant.*

You are instructed that you cannot find a verdict against the defendant on the ground that engine 213 was being negligently operated at a high and dangerous rate of speed at the time that it struck the deceased Fred Huxoll, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the operation of said engine at a high and dangerous rate of speed, even though your should find that said engine was in fact being operated at a high and dangerous rate of speed.

Refused. Def't excepts.

Instruction No. 16 *Requested by the Defendant.*

You are instructed that on October 16th, 1913, the plaintiff amended her petition by interlineing immediately after the word "speed" in the nineteenth line from the top of page five of her petition, the following words; "Without any brake or other appliance with which to stop the same, the brakes thereon being then broken defective and out of repair; without any bell or other device to give warning of the approach thereof, the bell on said engine being broken, defective and out of repair; with the curtain or blind covering window of cab, of the said engine so as to prevent the engineer and fireman in charge of said engine from seeing persons or objects in front thereof, and without rigging any bell or giving any other signal or warning." In this connection you are further instructed that the Act of Congress under which this action is brought provides that no action shall be maintained unless commenced within two years from the day the cause of action accrued, and that by reason of that provision the plaintiff cannot after two
45 years has expired, make new and distinct charges of negligence against the defendant, you are therefore instructed that the charges of negligence contained in said amendment which was made on October 16th, 1913 are withdrawn from your consideration and that you cannot base a verdict against the defendant on any of the charges of negligence included in the said amendment.

Refused. Def't excepts.

Instruction No. 17 *Requested by the Defendant.*

You are instructed that you cannot base a verdict against the defendant on the ground that the brakes on engine 213 were out of repair, broken, or not in working order, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of engine 213 to stop sooner than it did after the engineer was given the signal to stop.

Refused. Def't excepts.

Instruction No. 18 *Requested by the Defendant.*

You are instructed that you cannot base a verdict against the defendant in this case on the ground that the employees in charge of engine 213 failed to give any warning of the approach of said engine to the place where said Fred Huxoll was in the track, for the reason that the undisputed evidence in this case shows that said employees in charge of said engine had no reason to expect said Fred Huxoll was on said track or that any other employee was on the track at that point.

Refused. Def't excepts.

Instruction No. 19 *Requested by the Defendant.*

You are instructed that you cannot find a verdict against the defendant in this case on the ground that the defendant negligently failed to have a man on the forward end of engine 213 to look out, or on the ground that defendant failed to send a flagman ahead through the steam or failed to operate the engine under control for the reason that those in charge of the engine had no reason to anticipate that said Fred Huxoll was on the track or that any
46 employee was on the track at the point where the accident occurred.

Refused. Def't. excepts.

Instruction No. 20 *Requested by the Defendant.*

You are instructed that you cannot base a verdict against the defendant in this case on the violation of any rule or custom requiring signals to be given or precautions to be taken by a switch engine in order to avoid collisions with other engines or cars or trains, as a violation of such rules and customs would not be negligence toward said deceased.

Given. No obj. by p't'ff.

Instruction No. 21 *Requested by Defendant.*

You are instructed that you cannot base a verdict against the defendant in this case on the ground that the defendant gave no warning of the approach of said switch engine on the track or failed to take proper precautions to ascertain whether the track

was clear at the point where the accident occurred, for the reason that said Fred Huxoll had no duties to perform on or about the track at that point and the employees in charge of the engine had no reason to anticipate that said Fred Huxoll or any other employee would be on the track at that point.

Refused. Def't excepts.

Instruction No. 22 Requested by the Defendant.

You are instructed that habits or customs of the defendant's employees, such as brakemen, switchmen or others of riding on the foot board of its engines, and facing the direction in which the engine was moving, if any such habit or custom you believe from the evidence to have existed, would not be binding on the defendant company so long as such habits were for their own convenience and were not required by the defendant company for the purpose of warning employees or others from the track.

Refused. Def't excepts.

Instruction No. 23 Requested by the Defendant.

You are instructed that an instance or illustration of rid-
47 ing for their own convenience would be the case of a switchman whose duty it was to throw a switch to enable the engine to pass to another track, and, who, to save himself the effort of walking or to save time, rode the engine to the switch. Another instance might be that a brakeman or switchman, one of whose duties was to couple the engine to the car or string of cars, and who for the purpose of saving his steps or time, rode the engine to the car to be coupled on to. In other words, before you can find the defendant company negligent in failing to have an employee upon the front end of the engine (Meaning thereby the end in the direction the engine was moving) you must first find that either by rule or custom of the defendant company such person must have been required to have been riding there for the express and known purpose of among other things and other duties, of giving warning of the approach of the engine and of signaling the engineer of the presence of a person — other object upon the track over which the engine was passing. It is not enough to find the defendant negligent on this point that as suited their convenience, switchman, brakeman, or other employee did ride on that part of the engine herein referred to, either as a matter of convenience for themselves, or as a matter of habit between themselves.

Refused. Def't excepts.

Instruction No. 24 Requested by the Defendant.

You are instructed that defendant company has and had at the time of the accident the right to determine the style and build of the tenders to be attached to its engines at any and all places and its

employees assumed all risks of injury from the usual and ordinary operation thereof.

Refused. Def't excepts.

Instruction No. 25 Requested by the Defendant.

You are instructed that if you find from the evidence that at the time and place of the accident there was no rule or custom of the defendant company to keep a man stationed on the foot
48 board as a look out, having as one of his duties that of warning engineers going to their engines, and others in danger, and that this was known to the deceased, or was an obvious fact that he should have known, than in such case the failure of the defendant company to have a man stationed on the foot board at the time of the accident would not create any liability against defendant company, for the reason that the deceased by continuing in its employment under such circumstances, would be held to have assumed any risk of danger arising from the fact that no man was stationed on the foot board as a look out, and this would be true whether you think a man should have been so stationed.

Refused. Def't excepts.

Instruction No. 26 Requested by the Defendant.

You are instructed that it would be the duty of the deceased Fred J. Huxoll to use ordinary care to protect himself against the dangers incident to his work, and considering the character of the work in which both he and Engineer Zimmer were at the time of the accident engaged, it would not be the duty of the engineer (Zimmer) to keep a lookout for the deceased, nor stop his engine unless he discovered the deceased man was in imminent peril or had reason to believe he might be in such peril, of all of which there is no evidence in this case.

Refused. Def't excepts.

Instruction Number 27 Requested by the Defendant.

You are instructed that the mere fact that Fred J. Huxoll was run over by the defendant's engine would not of itself be sufficient to justify you in finding that the defendant had been negligent in any of the respects charged in the petition.

Given. Pl'ff excepts.

Instruction No. 28 Requested by the Defendant.

If you should find from the evidence in this case, that the bell on engine 213 was in working order at and prior to the
49 accident, it would then be your duty to determine whether or not the bell was being rung as the engine approached the

place where the accident occurred. In this connection I further instruct you that certain witnesses in this case have testified positively that the bell was being rung as the engine approached the place where the accident occur-ed, and other witnesses have testified that they did not hear the bell rung at that time, but no witnesses have testified positively aside from the witness Matthews, that the bell was not being rung at that time, and the testimony of such witnesses as testified that they did not hear the bell being rung, is not sufficient evidence alone to justify you in finding that the testimony of the witnesses who stated positively that it was being rung was not true. In other words, it is the law that where certain witnesses testify positively that the bell was rung and others testify that they did not hear it ringing, that such testimony does not constitute a conflict on the question as to whether or not the bell was in fact ringing, but under such circumstances it must be taken as an admitted fact that the bell in fact rung.

Refused. Def't excepts.

Instruction No. 29 Requested by the Defendant.

The jury are further instructed that if you find from the evidence that the defendant was not negligent, or that the said Fred J. Huxoll received the injuries which resulted in his death without any negligence on the part of the defendant, or that the injuries received that resulted in his death were the result of his own negligence and that his own negligence was the proximate cause of his death, then you will return a verdict finding for the defendant.

Refused. Def't excepts.

Instruction No. 30 Requested by the Defendant.

You are instructed that the evidence in this case shows that the deceased, Fred Huxoll, was guilty of contributory negligence
50 in going upon the main track, and that the act of Congress under which this suit is brought provides that the damages suffered by the widow and children shall be diminished by the jury in proportion to the amount of such contributory negligence as compared with the negligence of the defendant, if any. In other words is you should find and believe from the evidence that your verdict be for the plaintiff you should first determine what amount would compensate the widow and children of such deceased for such death, taking into consideration such elements as you are told in other instructions it is proper for you to consider, and then if you believe that the negligence of said Fred Huxoll was as great as the negligence of the defendant, if any, and bore an equal part in producing his death you should deduct from the amount which you find would compensate the widow and children one half of that amount and return the balance as your verdict in this case. If, on the other hand you should find that such negligence of the deceased was not as great as that of the defendant, or was greater than

that of the defendant you should deduct less than half or more than half, depending on whether such negligence was greater or less.

Refused. Def't excepts.

Instruction No. 31 Requested by the Defendant.

You are instructed that the act of Congress under which this suit is brought provides that where the injured employee has been guilty of contributory negligence the damage shall be diminished by the jury in proportion to the amount of such contributory negligence as compared with the negligence of the defendant, if any. In other words if you should find and believe from the evidence in this case that your verdict should be for the plaintiff you should first determine what amount would compensate the widow and children of the deceased, Fred Huxoll, for his death, taking into consideration such elements as you are told in other instructions it is proper for you to consider, and then if you believe that said Fred Huxoll was guilty of contributory negligence and
51 that that negligence was as great as the negligence of the defendant, if any, and bore an equal part in producing his death, you should deduct from the amount which you find would compensate the widow and children one half of that amount and return the balance as you- verdict in this case. If, on the other hand you should find that both the deceased and defendant were negligent but that the negligence of the deceased was not as great as that of the defendant or was greater than that of the defendant you whether deduct less than half or more than half, depending upon whether his negligence was greater or less.

Given. No objection by pl'ff.

Instruction No. 32 Requested by the Defendant.

You are instructed that a railroad track is itself a warning of danger and that in walking through the yards of the defendant at Sidney it was the duty of the deceased to make a vigilant use of his senses to protect himself from injury by a train or engine which might be running on the main track, and that if he got upon the main track and was injured when by a vigilant use of his senses he could have avoided getting upon such track he was guilty of contributory negligence.

Refused. Def't excepts.

Instruction No. 33 Requested by the Defendant.

You are instructed that the rule- of the defendant which have been introduced in evidence and which require the giving of signals on approaching crossings have no application to this case for the reason that the deceased was not on or near any crossing at the time he received the injuries which resulted in his death and that

such rules are withdrawn from your consideration and should not be considered by you in any way in your deliverations.

Refused. Def't excepts.

Instruction No. 34 Requested by the Defendant.

You are instructed that the rules of the defendant which have been introduced in evidence and which require the giving
52 of certain signals on approaching stations and bridges, have no application to this case for the reason that the deceased was not near any station or bridge at the time he received the injuries that resulted in his death, and for the reason that such rules have no application whatever to switch engines and that such rules are withdrawn from your consideration and should not be considered by you in any way in your deliberations.

Refused. Def't excepts.

Instruction No. 35 Requested by the Defendant.

You are instructed that the rule of the defendant which has been introduced in evidence and which requires enginemen to approach dist-nt and home signals in foggy or stormy weather with great care and with their trains under control, has no application in this case for the reason that said rule does not apply in any way to a switch engine and for the further reason that engine 213 was not approaching a distant or home signal at the time of the accident, and that such rule is withdrawn from your consideration and should not be considered by you in any way in your deliberations.

Refused. Def't excepts.

Instruction No. 35 Requested by the Defendant.

You are instructed that the rule of the defendant which has been introduced in evidence and which required enginemen to approach distant and home signals in foggy or stormy weather with great care and with their train under control, has no application in this case for the reason that said rule does not apply in any way to a switch engine and for the further reason that engine 213 was not approaching a distant or home signal at the time of the accident, and that such rule is withdrawn from your consideration and should not be considered by you in any way in your deliberations.

Refused. Def't excepts.

Instruction No. 36 Requested by the Defendant.

You are instructed that the rules of the defendant which have been introduced in evidence and which require certain pre-
53 cautions to be taken when cars are being shoved by an engine have no application in this case for the reason that switch

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engine 213 was not pushing any cars at the time it struck the deceased and that such rules are withdrawn from your consideration and should not be considered by you in any way in your deliberations.

Refused. Def't excepts.

Instruction No. 37 Requested by the Defendant.

You are instructed that the rule of the defendant, which has been introduced in evidence, and which required trains to stop where required by law has no application in this case for there is no law of this state or the United States that required an engine to stop before approaching the place where Mr. Huxoll was at the time he received the injuries which resulted in his death.

Refused. Def't excepts.

Instruction No. 38 Requested by the Defendant.

You are instructed that the rule of the defendant which has been introduced in evidence and which requires trains to approach all stations where the view is obscured at a rate of speed that will enable them to stop should an emergency arise, has no application in this case for the reason that such rule does not apply to switch engines and for the further reason that engine 213 was not approaching a station where the view was obscured at the time of the accident, and Fred Huxoll was not near any station at the time of the injury which he received and which resulted in his death.

Refused. Def't excepts.

Instruction No. 39 Requested by the Defendant.

You are instructed that the rules of the defendant which have been introduced in evidence and which required that whistles be sounded at all whistling posts, has no application to this case for the reason that there is no evidence in this case tending to show that switch engine 213 went by any whistling post near the point of the accident.

Refused. Def't excepts.

54 *Instruction No. 40 Requested by the Defendant.*

You are instructed that said Fred Huxoll assumed all risks and dangers incident to his work which were open and obvious even though such dangers and risks were the result of negligence on the part of the defendant, and that even if you should find that the defendant was negligent in some respects and that that negligence contributed to said Fred Huxoll's death, still you could not base your verdict against the defendant on such negligence if such negligence was known to said Fred Huxoll and the dangers to him from said negligence were open and obvious.

Refused. Def't excepts.

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Instruction No. 41 Requested by the Defendant.

You are instructed that the law is that a servant by his contract of employment, assumes the ordinary risks and dangers incident to his employment, including such risks and dangers as are due to the master's negligence and which are open and obvious but not inclusing risks and dangers which are due — the master's negligence and which are not open and obvious and not known to the employee.

Refused. Def't excepts.

Instruction No. 42 Requested by the Defendant.

You are instructed that the evidence fails to disclose any rule of the defendant company which required the presence of switchmen or other employees of the company upon the foot boards of the engines of defendant company, facing the direction in which the engine was moving, while operating in the yards of the defendant company, for the purpose of either warning persons of the approach of the engines, or for the purpose of signaling the engineer in charge of the engine operating in the yards of the presence of any person upon the track over which the engine was moving.

Refused. Def't excepts.

Instruction No. 43 Requested by the Defendant.

You are instructed that pain, grief and suffering, and loss
55 of society are not elements of damage in this case, and if you should find for the plaintiff you will not consider them in arriving at your verdict.

Refused. Def't excepts.

Instruction No. 44 Requested by the Defendant.

You are instructed that the fact that steam and smoke were blowing across the main track in the Sidney yards on January 1st, 1911 immediately prior to and at the time of the accident so as to obscure the view of anyone who might be operating an engine along the main line past water crane, was open and obvious and under the evidence in this case was known by the deceased Fred Huxoll and that said deceased assumed the risk of working in and about said steam and that you cannot base a verdict against the defendant in this case on the ground that it was negligent in permitting said smoke and steam, to escape and obscure the view.

Refused. Def't excepts.

Instruction 45 Requested by the Defendant.

Where several witnesses testify positively that a bell was ringing on an engine at a certain time and several other witnesses testify

that they did not hear the bell ringing at that time, but the evidence shows that those who testified they did not hear the bell ringing were not giving particular attention to ascertain whether the bell was ringing and might or might not have heard it if it was in fact ringing, then I instruct you that the negative testimony of those who testified they did not hear the bell ringing does not contradict the testimony of those who testified positively the bell was ringing and you would not be justified from such testimony alone in finding that the bell was not in fact ringing at the time in question.

Refused. Def't excepts.

56 *Instruction No. 46 Requested by the Defendant.*

You are instructed that the charge of negligence contained in the plaintiff's petition to the effect that the defendant was negligent in failing to have a man on the foot board of engine 213 as look out, is withdrawn from your consideration, for the reason that there is no evidence in this case tending to show that if a lookout had been on the forward end of the engine he could have seen Mr. Huxoll in time to have avoided the accident.

Refused. Def't excepts.

Instruction No. 47 Requested by the Defendant.

You are instructed that you cannot base a verdict against the defendant in this case on the ground that it failed to have a look out on the foot board of engine 213, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of the defendant to have a look out so located on said engine.

Refused. Def't excepts.

Endorsed: 47-76. District Court, Lancaster County, Nebraska—Ella Huxoll, adm'x of the estate of Fred J. Huxoll, Deceased, Pl't'f, vs. Union Pacific Railroad, Def't.—Clerk's Office District Court Lancaster County, Nebraska. Filed Oct. 23, 1913. J. S. Baer, Clerk Dist. Court. 47 Instructions Requested by Defendant.

Instructions by the Court to Jury.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant.

Gentlemen of the Jury:

57 This is an action brought by Ella Huxoll, the duly appointed Administratrix of the estate of Fred J. Huxoll, deceased for and on behalf of said estate and next of kin of said deceased,

and against the defendant, the Union Pacific Railroad Company, a corporation for damages on account of and for the reasons alleged in plaintiff's amended petition: that plaintiff during the year 1911 was duly appointed administratrix of the estate of Fred J. Huxoll, deceased, by the County Court of Lincoln County, Nebraska, that she has duly qualified and is now acting as such administratrix further alleging in her amended petition that defendant is a corporation organized under the laws of the State of Utah and owns and operates a line of railroad from Council Bluffs, Iowa, to Ogden in the State of Utah, which crosses the State of Nebraska from east to west and extends through the County of Cheyenne and the city of Sidney therein; that defendant is a common carrier of freight and passengers upon its said line of railroad and is engaged in commerce between the several states and transports thereon persons and freight from points in Iowa to points in Nebraska and to points in other states westward from Nebraska; alleging further that Fred J. Huxoll, late of Lincoln County, Nebraska, was on January 1, 1911, a locomotive engineer in the employment and service of defendant, operating locomotive engines which moved the defendant's trains in carrying goods and passengers from and between points in one state to points in other states and in commerce between the States, and said decedent was on January 1, 1911, actually employed by the defendant in interstate commerce when he received the injuries from which he died on or about the 2nd day of January, 1911; alleging that said decedent left surviving him Ella Huxoll, his widow, Marian Huxoll, a daughter, then aged two years and seven months, and Frederick A. Huxoll a son, then aged one year and one month; and alleging by reason of the premises the defendant is liable to the plaintiff as Administratrix for the benefit of herself in her
58 personal right as widow, and the said surviving children, for all damages caused by the fatal injuries suffered by said decedent resulting from the negligence of defendant's officers, agents, and employees, and its negligence in its engine, appliances, machinery, track, roadbed, and rails, and other equipment, under and by virtue of an act of Congress approved April 22nd, 1908, entitled "An Act Re*a*lting to the Liability of Common Carriers by Railroad to their Employees in Certain Cases." Alleging further that defendant maintains at its station at Sidney, Nebraska, freight yards and terminal facilities, including a round house for the repair and housing of its engines, ash pits coal chutes, water crane and car tracks and that said station is a division point of the freight service of defendant, at which engines and crews are changed; alleging that defendant negligently located and constructed said round house in close proximity to its said main line track, and on January 1, 1911, was negligently maintaining and operating the same as aforesaid so that the smoke and steam enveloped and obscured its engines and cars passing over said main line track, and obstructed the view of engine and train movements thereon and upon the side tracks and engine tracks in near proximity thereto and to the said water crane, to the peril of its employees and servants working in and about said yards; and alleging that said Fred J. Huxoll, deceased

about the noon hour of January 1, 1911, while in the service of defendant and in discharge of the duties of his employment, proceeded to the defendant's wash house and dressing room and from there in the vicinity of the round house he proceeded on his way to the water crane where his engine assigned him was standing for the purpose of boarding and operating said engine, through a violent snowstorm, high wind and excessively cold weather; alleging that defendant negligently permitted said water crane to become out of repair and water to fall from which ice accumulated in the vicinity of said water crane, rendering the way slippery and dangerous, and defendant negligently permitted dark clouds of smoke and
59 steam to escape from said round house so negligently located near the water crane and engine tracks adjacent thereto, and by reason thereof the said deceased was unable to see or distinguish the approach or movements of engines and cars for any appreciable distance; and while he was proceeding from the washhouse to the point where the engine assigned to him was awaiting him, defendant negligently and carelessly, and without warning, backed an ordinary road locomotive engine, which it was carelessly and negligently using as a switch engine upon and over the said Fred J. Huxoll, thereby inflicting fatal injuries upon his person, from which the next following day he died; that said engine so backed up had a high and wide water tank which obstructed the view of the engineer and had no foot boards or running boards on either end or side of the engine while the commonly used switch engines have narrow and retreating or sloping water tanks and have and are constructed with running boards on both ends of the engine where switchmen are stationed for a lookout; that defendant failed to comply with the common and general practice required in the Sidney yards by failing to have said foot boards on said road engine used for switching purposes, and have a switchman or brakeman thereon as a lookout, and that defendant at the time of running down said deceased said road engine so used for switching purposes at a needlessly high and dangerous rate of speed without any brake or other appliance with which to stop the same, the brake thereon being broken, defective and out of repair, without any bell or other device to give warning of the approach thereof, the bell on said engine being broken, defective and out of repair, with the curtain or blind covering the window of the cab of said engine so as to prevent the engineer and fireman in charge of said engine from seeing persons or objects in front thereof, and without ringing any bell or giving any other signal or warning; alleging further the safety of defendant's employees working in said yards requires that each engine be so operated as to be able to stop within the distance the track is actually seen to be clear, in common and general
60 practice during foggy and stormy weather, and at points where the track is obscured by smoke and steam extra precautions are required and taken; alleging that the road engine crew negligently and carelessly failed to keep the said road engine under control but to the contrary negligently operated the same at a high rate of speed and that it could not and was not stopped within the

distance the track ahead could be seen to be clear nor within a distance of seventy feet beyond any point that could be seen by the fireman or engineer; and alleging that at the time of the infliction of the fatal injuries the said Fred J. Huxoll was exercising due care, and the said fatal injuries were inflicted and caused wholly by the aforesaid several acts of carelessness and neglect of the defendant; alleging further that at the time of his death said Fred J. Huxoll was capable and was earning as said locomotive engineer the wages of Two Hundred Dollars per month, which he then and previously thereto, devoted wholly to the support and maintenance of the plaintiff, his wife, and his said infant children Marian and Frederick, and at and prior to the infliction of said fatal injuries he was an unusually strong rugged and vigorous man physically, and of the age of twenty nine years; alleging further that by reason of the death of the said Fred J. Huxoll, his widow, and his said children have sustained a pecuniary loss, injury and damage of the sum of Fifty Thousand Dollars, for which they pray judgment against the defendant.

Given.

2.

The defendant Union Pacific Railroad Company, a corporation for its answer to plaintiff's amended petition herein, alleges as follows; denies each and every allegation in plaintiff's amended petition contained except such as are expressly admitted to be true; admits its status as a corporation as alleged in first paragraph of these instructions; admits that at the time of the accident referred to in paragraph one of these instructions Fred J. Huxoll was a loco-
61 motive engineer and that on January 2nd 1911 he died as a result of such accident, leaving as his survivors his widow Ella Huxoll, and the two children therein named; and it further admits as stated in paragraph one of these instructions that it has a station at Sidney, Nebraska, freight yards and terminal facilities, including a round house for the repair and housing of engines ash pits coal chutes, water cranes and railroad tracks; and admits that Sidney so far as freight service is concerned is a divisional point, where engines and crews are shifted and changed in the regular course of the company's business; admits that during the year 1911 plaintiff Ella Huxoll was duly appointed Administratrix of the estate of Fred J. Huxoll, deceased, by the County Court of Lincoln County, Nebraska that she was duly qualified and is now acting as such administratrix; admits that said freight train which said Fred J. Huxoll, was to haul from Purdue to Sidney was a train loaded with interstate commerce goods and freight; and defendant further alleges and says that the alleged acts of negligence set out is said amended petition were not charged against the defendant or any action based thereon against the defendant for more than two years after the time said alleged act of negligence *are* charged to have occurred; further answering alleges that the injuries complained of in paragraph one of these instructions were not due to any negligence or want of care on the part of defendant, and charges the fact to be that such injuries were the result of the negligence of the

deceased himself, proximately causing said injuries, and proximately contributing thereto; further answering, defendant alleges that the risks and dangers, if any, attending the business in which deceased was engaged at the time of the accident were incident to said business and were open and obvious to him, and were such as were known to the deceased at that time, or would have been so known to him had he been in the exercise of ordinary care; and further alleges that such risks and dangers, if any were assumed by the deceased
62 at the time he entered the employ of defendant, and were continually being assumed by him up to and including the time of the accident; and further alleges that the deceased at the time of the accident, was walking along one of the tracks in the Sidney yards, which was used in connection with the switching operations of defendant, and it is further stated by way of defense that the movement of the engine that struck the deceased was incidental to the business of railroading as herein specified, and the risks and dangers of such operation, under the circumstances, were being assumed by the deceased at the time of the accident in question and asks that it be allowed to go hence with its costs herein expended.

Given.

3.

The plaintiff for reply to the answer of defendant Union Pacific Railroad Company, deny each and every allegation not admitted in said answer contained.

These pleadings make up the issues which you are to try and determine by your verdict in this case.

Given.

4.

You are instructed that the burden of proof in this case is upon the plaintiff to prove by a preponderance of the evidence all the material allegations in her petition. That is to say, that at the time of the accident alleged the defendant was guilty of negligence, as stated in the first paragraph of these instructions, that as the proximate result of such negligence the plaintiff's intestate was fatally injured and died as a result of said injuries so received as alleged in the first paragraph of these instructions; and that by reason of said injuries resulting in death of deceased the plaintiff has been damaged, as alleged in the first paragraph of these instructions; and the amount of such damages. When the plaintiff has shown these facts then the burden of proof is upon the defendant to prove by
63 a preponderance of the evidence the allegations of its answer constituting its defense to plaintiff's action. That is to say, that any injuries received by the plaintiff were the proximate result of his own negligence or that his own negligence contributed thereto, unless the plaintiff's own testimony shows that the deceased Fred J. Huxoll was guilty of negligence at the time of the accident.

Given.

5.

You are instructed that the question of negligence of the defendant and of contributory negligence of plaintiff's intestate constitute

the gist of this action, and are the ones to which you should direct your attention, applying thereto the evidence adduced on the trial, and the law as given you in these instructions.

Negligence is the omission to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do; in other words, it is the absence of care according to the circumstances.

Given.

6.

When an accident occurs which is in its nature inevitable; that is to say, one of those accidents which will occur in spite of the exercise of that ordinary care and prduence which the circumstances require, by the parties to it, then no liability arises as against either of the parties to it. That is to say the mere fact that an accident occurs is not sufficient to create liability. The law presumes that all persons and agents exercise ordinary care until the contrary is shown.

Given.

7.

64 You are instructed that the burden of proving negligence rests on the party alleging it; and where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence. And in this case if the jury find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and the jury should find the issues for the defendant.

Given.

8.

You are instructed that ordinary care on the part of the plaintiff is that degree of care and diligence which persons of ordinary prudence would usually use under the circumstances in which the plaintiff was placed at the time the alleged injury was received.

Given.

9.

You are instructed that if you believe that any witness in this case has knowingly sworn falsely to any material matter involved this would justify you in entirely disregarding the testimony of such witness, except in so far as that witness's testimony has been corrobated by other competent evidence.

Given.

10.

Plaintiff's petition charges that the deceased Fred J. Huxoll was at the time of receiving the injuries which caused his death actually employed by the defendant in interstate commerce. An Act of Congress relating to the liability of common carriers by railroad to their employes in certain cases, provides that every common car-

rier by railroad while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or
65 husband and children of such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road bed, works or other equipment.

Given.

11.

A locomotive engineer who, in obedience to a call by the railroad company, has proceeded to the washroom provided by the company at a division station for that purpose, to appropriately dress for service on the engine, and is proceeding thence through the company's yards to board and to take charge of the engine assigned to him for the purpose of proceeding with said engine to a point on the main line for the purpose of moving a freight train containing continuous shipments of goods destined from a point or points in one state to a point or points in another state, is engaged in commerce between the states within the meaning of the act of congress mentioned in these instructions; and within this rule you are instructed that, upon the evidence and the facts stipulated in the course of the trial, the deceased, Fred J. Huxoll, was an employe of the defendant engaged in interstate commerce when he received the fatal injuries complained of in the petition.

Given.

12.

The evidence shows, without dispute that the railroad of the defendant, of which the yard at Sidney, where the accident in question occurred is a part *is* a highway of interstate commerce, and that defendant's road engine No. 213, which col-ided with deceased, Fred J. Huxoll, was an engine which the defendant used in hauling interstate commerce. An act of Congress required that such engines be equipped with a power driving wheel brake so that the engineer can control its speed without requiring the use of a common hand
66 brake. The Act of congress under which this suit is prosecuted, making carriers by railroads while engaged in interstate commerce responsible for injury or death to an employe resulting in whole or in part, from negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed or other equipment, provides, among other things that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence or to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the

safety of employes contributed to the injury or death of such employe. If you find from the evidence that the death of Fred J. Huxoll resulted in whole or in part from the negligence of any of the officers, agents, or employes of the defendant, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed or other equipment, alleged or charged in the petition and that the power brake of defendant's road engine No. 213 was not at the time of the accident in working order and could not then be used by the engineer on such locomotive to control its speed, and the fact that such power brake was not in working order and could not be used by the engineer to control the speed of the engine, contributed to the death of Fred J. Huxoll, then the law is that the deceased, Fred J. Huxoll cannot be held either to have been guilty of contributory negligence or to have assumed the risks of his employment.

Given.

13.

Among the allegations of the petition are the averments that in defendant's switching operations and particularly in its yard at Sidney, the safety of its employes and servants in and about the yards and of those called there for any special service required a brakeman or servant to be stationed on the leading end of the head car or engine for the purpose of keeping a lookout and warn-
67 ing the engineer and those upon the track of the presence of danger by collision or otherwise in time to be able to stop the engine or cars before colliding with any servant within the yard and that in general and common practice a brakeman or servant was so stationed for that purpose. The petition charges that in the movement of the engine which inflicted the fatal injuries complained of, no brakeman or other servant was placed at the rear or leading end of the engine to keep a lookout ahead and that no foot board or other place of rest was provided on said engine for that purpose, as is provided by locomotive engines in common use in the switching service, and that the defendant negligently and carelessly failed to so station a servant to keep a lookout or to provide an engine suitable equipped therefor. If you find from the evidence that it was the custom of the defendant railroad Company, at that time, to have a man stationed on the footboard on the leading end of the engine or cars as a lookout, and that the defendant was guilty of negligence in failing to so station a man as a lookout, and that the death of Fred J. Huxoll resulted, in whole or in part, from such negligence, then the plaintiff would be entitled to recover in this action.

Given.

14.

Among the allegations of the petition are averments that in switching engines and cars in yards like those at Sidney the safety of its employes working in and about such yards and those called there for any special service, required that each engine be so operated as to be able to stop within the distance the track is seen to be clear,

and that in general and common practice in switching operations, such engines are so operated, and that extra precautions are required and taken in common and general practice, in foggy and stormy weather, and at points where the track is obscured by smoke and steam. The petition charges that in operating said engine at the time it inflicted fatal injuries upon the person of Fred
68 J. Huxoll, the defendant and the engine crew in charge thereof negligently and carelessly failed to keep said engine so under control as to be able to stop within the distance that the track was seen to be clear. If you find from the evidence that the common and general practice in such switching operations was to keep the speed of the engine so under control as to be able to stop within the distance the track was seen to be clear, and that extra presautions were in common and general practice, required and taken at points where the tracks were obscured by smoke and steam, and that at the time of the casualty in question the engine crew in charge of engine No. 213 negligently failed to keep said engine so under control as to be able to stop within the distance the track was seen to be clear, and that the death of Fred J. Huxoll resulted in whole or in part from such negligence, then in such case, the plaintiff would be entitled to recover in this action.

Given.

15.

The distance from the main line track at which the round houses of the defendant were located, the elevation of the ground beyond the round house, the tendency of smoke from the round houses to collect about the tracks, and the presence of ice, to some extent, at least, in the vicinity of the water crane, together with the conditions of the weather, as shown by the evidence, are proper subjects of consideration in determining whether the acts of the defendant's servants, on the one hand and of the deceased, on the other, were such as persons of ordinary care and prudence would have done at the time and under the conditions surrounding the casualty in question; but the incidents just referred to are not, in and of themselves, causes or grounds of negligence upon which a recovery in favor of plaintiff can be had.

Given.

16.

The law is that a servant by his contract or employment, assumes the ordinary risks and dangers incident to his employment
69 but in this case the deceased, Fred J. Huxoll, cannot be held to have assumed the risks of his employment if you find that the power driving wheel brake on defendant's engine No. 213 with which he collided, was not at the time of the accident in working condition, and that fact contributed to his death. The ordinary risks and dangers of a servant's employment assumed by him as a matter of law do not include risks and dangers due to the masters negligence unless such risks and dangers are actually known to the servant or are open and obvious.

Given.

17.

You are instructed that you cannot base a verdict against the defendant in this case on the violation of any rule or custom requiring signals to be given or precautions to be taken, by a switch engine in order to avoid collisions with other engines, or cars or trains, as a violation of such rules and customs would not be negligence toward such deceased.

Given.

18.

You are instructed that the mere fact that Fred J. Huxoll was run over by the defendant's engine, would not of itself be sufficient to justify you in finding that the defendant had been negligent in any way of the respects charged in the petition.

Given.

19.

The jury are further instructed that if you find from the evidence that the defendant was not negligent, or that the said Fred J. Huxoll received the injuries which resulted in his death without any negligence on the part of the defendant, or that the injuries received that resulted in his death were the result solely of his own negligence, and that his own negligence was the proximate cause of his death, then you will return a verdict finding for the defendant.

Given.

70 20.

Where several witnesses testify positively that a bell was ringing on an engine at a certain time and several other witnesses testify that they did not hear the belling ringing at that time, but the evidence shows that those who testified they did not hear the bell ringing were not giving particular attention to ascertain whether the bell was ringing and might or might not have heard it, if it was in fact ringing then I instruct you that the negative testimony of those who testified they did not hear the bell ringing does not contradict the testimony of those who testified positively the bell was ringing and you would not be justified from such testimony alone in finding that the bell was not in fact ringing at the time in question.

Given.

21.

The jury are further instructed that if you find from the evidence that the defendant was not negligent or that the said Fred J. Huxoll received the injuries which resulted in his death without any negligence on the part of the defendant, or that the injuries received that resulted in his death were the result of his own negligence, and that his own negligence was the proximate cause of his death, then you will return a verdict finding for the defendant.

Given.

22.

You are instructed that the rules of the defendant which have been introduced in evidence and which require the giving of certain signals on approaching stations and bridges, have no application to this case for the reason that the deceased was not near any station or bridge at the time he received the injuries that resulted in his death, and for the reason that such rules have no application whatever to switch engines and that such rules are withdrawn from your consideration and should not be considered by you in any way in your deliveberations.

Given.

71 23.

You are instructed that the rule of the defendant which has been introduced in evidence, and which required trains to stop where required by law has no application in this case for there is no law of this state or the United States that requires an engine to stop before approaching the place where Mr. Huxoll was at the time he received the injuries which resulted in his death.

Given.

24.

You are instructed that the Act of Congress under which this suit is brought provides that where the injured employee has been guilty of contributory negligence the damages shall be diminished by the jury in proportion to the amount of such contributory negligence as compared with the negligence of the defendant, if any. In other words if you should find and believe from the evidence in this case that your verdict should be for the plaintiff, you should first determine what amount would compensate the widow and children of the deceased, Fred Huxoll, for his death, taking into consideration such elements as you are told in other instructions it is proper for you to consider, and then if you believe that said Fred Huxoll was guilty of contributory negligence and that that negligence was as great as the negligence of the defendant, if any, or bore an equal part in producing his death, you should deduct from the amount which you find would compensate the window and children one half of that amount, and return the balance as your verdict in this case. If, on the other hand you should find that both the deceased and defendant were negligent but that the negligence of the deceased was not as great as that of the defendant, or was greater than that of the defendant, you should deduct less than half or more than half, depending upon whether his negligence was greater or less.

Given.

25.

72 The fact that road engine No. 213 was used by defendant for switching purposes at the time of the accident, is not in and of itself, negligence, and a recovery in plaintiff's favor

cannot be based upon the fact that such engine was so used. It is proper however, to take into consideration the type, form and equipment of said road engine and any variance in its equipment from the class and type of engine usually employed in the switching service in determining whether the acts of defendant's servants, on the one hand and of the deceased, on the other, were such as persons of ordinary character and prudence would have done at the time and under the conditions surrounding the casualty in question.

Given.

26.

This suit is prosecuted by Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, in her own behalf as widow and also in behalf of Marian Huxoll, the daughter of said deceased alleged to have been of the age of two years and seven months and Frederick A. Huxoll a son of said deceased alleged to have been of the age of one year and on month, at the date of their father's decease. The Act of Congress mentioned is intended only, in the cases in which it created liability in damages, to compensate the surviving relatives of such deceased employe, for the actual pecuniary loss resulting to the particular person or persons for whose benefit the action is given. The recovery must therefore, be limited to compensating those relatives for whose benefit the administratrix sues, as are shown to have sustained some pecuniary loss. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the injured employe. The damage is limited to the financial loss thus sustained, and you are instructed that pain, grief and suffering, loss of society are not elements of damage in this case, and if you should find for the plaintiff you will not consider them in arriving at your verdict. If you find for the plaintiff, you will therefore, ascertain and state in your verdict how much, if anything you find for the widow Ella Huxoll; and how much if anything you find for the minor daughter Marian Huxoll; and how much if *any* anything you find for the minor son, Frederick A. Huxoll, and you will further state the aggregate award in favor of the plaintiff at the sum of the several amounts apportioned by you among the parties for whose benefit the suit is brought.

73

Given.

27.

If you find for the plaintiff the measure of damages will be such a sum as will justly compensate the persons for whose benefit the suit is brought, for such pecuniary benefits as you believe from the evidence the beneficiaries for whom suit is brought had a reasonable expectation of receiving from the deceased, if his death had not been so occasioned, subject, however to the contingencies and qualifications stated in the instruction next following.

Given.

28.

The law governing this action touching the amount recoverable is that if the death of Fred J. Huxoll resulted in whole or in part from the negligence of defendant, charged in the petition the fact that the deceased may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the defendant. The application of this provision for diminishing the damages in proportion to the amount of negligence attributable to the employe will depend upon whether you find from the evidence that the deceased was in fact, guilty of contributory negligence. If you find in favor of plaintiff and that deceased was not guilty of contributory negligence, then you will not be concerned with this provision. If you find that the deceased was guilty of contributory negligence, then in arriving at the measure of damages you should first ascertain from the evidence the full amount of the pecuniary loss and damage sustained by his widow and children because of his death, and render a verdict for that
74 sum, diminished in proportion to the amount of negligence which you find attributable to the deceased.

Given.

29.

You should consider carefully the testimony of the several witnesses and harmonize the whole evidence so far as it can be done; but in the event there is a conflict of testimony that you cannot reconcile, it is for you to say, and you alone, who are the more worthy of belief.

In determining the weight to be given to the testimony of the several witnesses, the jury should take into consideration their interest in the result of the suit, if any such is proved; their conduct and demeanor while testifying, their apparent fairness or bias if any such appears; their opportunities for seeing or knowing the things about which they testify; the reasonableness or unreasonableness of the story told by them, and all the evidence and facts and circumstances proved tending to corroborate such or contradict such witness if any such appears.

Given.

30.

You will take these instructions together with the blank forms of verdict prepared for you, retire to your jury room, select your foreman, who will sign your verdict, and there from the evidence before you and the law as given you in these instructions determine upon your verdict.

Given.

P. JAS. COSGRAVE,
Judge of District Court.

Endorsed: 47-76. In District Court Lancaster County, Nebraska—Ella Huxoll, Adm'x of the Estate of Fred Huxoll, Deceased vs. Union Pacific Railroad Company—30 Instruction by the Court—Clerk's Office District Court Lancaster County, Nebraska. Filed Oct. 23, 1913, J. S. Baer, Clerk Dist. Court.

75 *Additional Instruction Given by the Court.*

In the District Court in and for Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

Gentlemen of the Jury:

If you should agree upon a verdict while the Court is not in session, your foreman may sign the same, seal it in an envelope and retain it in his possession, when you may be allowed to separate, returning in a body to the Court room at 9:30 o'clock tomorrow morning. During this time it will not be proper — you to talk about your verdict or inform any one what the contents of it may be, until it is delivered to this Court opened, read and received as your verdict.

P. JAS. COSGRAVE, *Judge.*

Endorsed: 47-76. In the District Court of Lancaster County, Nebraska—Ella Huxoll, Adm'x of the estate of Fred J. Huxoll deceased, Plaintiff vs. Union Pacific Railroad Company, Defendant—I- Additional Instruction Given by the Court—Clerk's Office District Court Lancaster County, Nebraska—Filed Oct. 23, 1913. J. S. Baer, Clerk Dist. Court.

Defendant's Exceptions to Instructions.

In the District Court, Third Judicial District in and for Lancaster County, Nebraska.

Docket 47—Page 76.

ELLA HUXOLL, Administratrix, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

76 Comes now the defendant in the above entitled cause and *expects* to the giving and refusal to give instructions as follows:

To instruction number 1 given by the Court on its own motion.
To instruction number 2 given by the Court on its own motion.
To instruction number 3 given by the Court on its own motion.

To instruction number 4 given by the Court on its own motion.
To instruction number 5 given by the Court on its own motion.
To instruction number 6 given by the Court on its own motion.
To instruction number 7 given by the Court on its own motion.
To instruction number 8 given by the Court on its own motion.
To instruction number 9 given by the Court on its own motion.
To instruction number 10 given by the Court on its own motion.
To instruction number 11 given by the Court on its own motion.
To instruction number 12 given by the Court on its own motion.
To instruction number 13 given by the Court on its own motion.
To instruction number 14 given by the Court on its own motion.
To instruction number 15 given by the Court on its own motion.
To instruction number 16 given by the Court on its own motion.
To instruction number 17 given by the Court on its own motion.
To instruction number 18 given by the Court on its own motion.
To instruction number 19 given by the court on its own motion.
To instruction number 20 given by the Court on its own motion.
To instruction number 21 given by the Court on its own motion.
To instruction number 22 given by the Court on its own motion.
To instruction number 23 given by the Court on its own motion.
To instruction number 24 given by the Court on its own motion.
To instruction number 25 given by the Court on its own motion.
To instruction number 26 given by the Court on its own motion.
To instruction number 27 given by the Court on its own motion.
To instruction number 28 given by the Court on its own motion.
To instruction number 29 given by the Court on its own motion.
To instruction number 30 given by the Court on its own motion.

77 To the refusal to give instruction number 1 requested by defendant.

To the refusal to give instruction number 2 requested by defendant.

To the refusal to give instruction number 3 requested by defendant.

To the refusal to give instruction number 4 requested by defendant.

To the refusal to give instruction number 5 requested by defendant.

To the refusal to give instruction number 6 requested by defendant.

To the refusal to give instruction number 7 requested by defendant.

To the refusal to give instruction number 8 requested by defendant.

To the refusal to give instruction number 9 requested by defendant.

To the refusal to give instruction number 10 requested by the defendant.

To the refusal to give instruction number 11 requested by the defendant.

To the refusal to give instruction number 12 requested by the defendant.

To the refusal to give instruction number 13 requested by the defendant.

To the refusal to give instruction number 14 requested by the defendant.

To the refusal to give instruction number 15 requested by the defendant.

To the refusal to give instruction number 16 requested by the defendant.

To the refusal to give instruction number 17 requested by the defendant.

To the refusal to give instruction number 18 requested by the defendant.

To the refusal to give instruction number 19 requested by the defendant.

To the refusal to give instruction number 20 requested by the defendant.

To the refusal to give instruction number 21 requested by the defendant.

To the refusal to give instruction number 22 requested by the defendant.

To the refusal to give instruction number 23 requested by the defendant.

To the refusal to give instruction number 24 requested by the defendant.

To the refusal to give instruction number 25 requested by the defendant.

To the refusal to give instruction number 26 requested by the defendant.

To the refusal to give instruction number 27 requested by the defendant.

To the refusal to give instruction number 28 requested by the defendant.

To the refusal to give instruction number 29 requested by the defendant.

To the refusal to give instruction number 30 requested by the defendant.

To the refusal to give instruction number 31 requested by the defendant.

To the refusal to give instruction number 32 requested by the defendant.

78 To the refusal to give instruction number 33 requested by defendant.

To the refusal to give instruction number 34 requested by defendant.

To the refusal to give instruction number 35 requested by defendant.

To the refusal to give instruction number 36 requested by defendant.

To the refusal to give instruction number 37 requested by defendant.

To the refusal to give instruction number 37 requested by defendant.

To the refusal to give instruction number 38 requested by defendant.

To the refusal to give instruction number 39 requested by defendant.

To the refusal to give instruction number 40 requested by defendant.

To the refusal to give instruction number 41 requested by defendant.

To the refusal to give instruction number 42 requested by defendant.

To the refusal to give instruction number 43 requested by defendant.

To the refusal to give instruction number 44 requested by defendant.

To the refusal to give instruction number 45 requested by defendant.

To the refusal to give instruction number 46 requested by defendant.

To the refusal to give instruction number 47 requested by defendant.

E. C. STRODE,
W. P. MILES &
B. W. SCANDRET,
Att'ys for Defendant.

Exceptions taken and allowed at the time.
P. JAS. COSGRAVE, *Judge.*

In the District Court of Lancaster County, Nebraska.

Docket 47, Page 76.

ELLA HUXOLL, Administratrix, Pl'ff,
vs.
UNION PACIFIC R'L'D CO., Def't.

Now comes the above named defendant and excepts to the refusal of the court to submit to the jury the special question requested by this defendant.

E. C. STRODE,
W. P. MILES,
B. W. SCANDRETT,
Att'ys for Def't.

79 Exceptions taken and allowed at time.
P. JAS. COSGRAVE, *Judge.*

Endorsed: 47-76. Ella Huxoll, Adm'x, vs. U. P. R. R. Co.—Defendant's Exceptions to Instructions—Clerk's Office District Court Lancaster County, Nebraska—Filed Oct. 13, 1913. J. S. Baer, Clerk Dist. Court.

Journal Entry.

That on the 23rd day of October A. D. 1913 (that being the 21st Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 36 to-wit:

47-76.

ELLA HUXOLL, Administratix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day again come the parties hereto with their attorneys, and come also the jury heretofore inpaneled and sworn herein, according to law, and on request of the plaintiff by her attorneys the instructions of the Court read to the jury before the argument of counsel, and after hearing the argument of counsel for plaintiff and defendant, the said jury retired to their room in custody of the Sheriff to deliberate upon their verdict.

Journal Entry.

That on the 24th day of October A. D. 1913 (that being the 22nd Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 39 to-wit:

80 47-76.

ELLA HUXOLL, Administratix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day come the parties hereto, with their attorneys and come also the jury heretofore impaneled and sworn herein according to law, with their sealed verdict in writing and say:

"The State of Nebraska,
Lancaster County, ss:

September term, A. D. 1913, to wit, October 23rd, 1913.

Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,
vs.
Union Pacific Railroad Company, Defendant.

We, the Jury, duly impaneled and sworn in the above entitled cause, do find in favor of plaintiff and against the defendant and we do assess the amount of plaintiff's damages at the sum of $20,000.00.

We approtion the sum so awarded among the beneficiaries as follows:

To Ella Huxoll, Widow, $6668.00.
To Marian Huxoll, infant daughter, $6666.00.
To Frederick A. Huxoll, infant son, $6666.00.

E. C. WITHAM, *Foreman.*

Whereupon it is by the court ordered that the said jury be and hereby are discharged from further deliberation of this case.

It is therefore considered, ordered and adjudged by the Court, that, in accordance with the verdict of the jury, the said plaintiff, Ella Huxoll, Administratrix, do have and recover of and from the said defendant, Union Pacific Railroad Company, the said
81 sum of Twenty Thousand ($20,000.00) Dollars and that the said sum be apportioned as follows; Six Thousand Six Huncred Sixty eight ($6,668.00) Dollars in favor of Ella Huxoll, widow Six thousand Six Hundred and Sixty-six Dollars in favor of Marian Huxoll, infant daughter; and Six Thousand Six Huncred and sixty six ($6666.00) Dollars in favor of Frederick A. Huxoll, infant son; together with the costs in this action, taxed at $— for which execution is hereby awarded.

Motion for New Trial.

In the District Court of Lancaster County, Nebraska.

Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,
vs.
Union Pacific Railroad Company, Defendant.

Comes no*t* the defendant and moves the Court to set aside the verdict of the jury in the above entitled case and to grant a new trial for the following reasons to-wit:

1. Irregularity in the proceedings of the Court by which the defendant was prevented from having a fair trial.

2. Irregularity in the proceedings of the plaintiff by which the defendant was prevented from having a fair trial.

3. Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

4. Misconduct of Counsel for plaintiff on account of which the defendant was prevented from having a fair trial.

5. Misconduct of the jury by reason of which defendant was prevented from having a fair trial.

6. Misconduct of plaintiff by reason of which defendant was prevented from having a fair trial.

82 7. Abuse of discretion of the Court on account of which the defendant was prevented from having a fair trial.

8. Accident and surprise which ordinary prudence could not have guarded against and which prevented the defendant from having a fair trial.

9. For the reason that the amount of verdict is excessive appearing to have been given under the influence of passion and prejudice.

10. For the reason that the amount of damages found and determined by the jury is excessive and was given under the influence of passion and prejudice.

11. For the reason that the verdict of the jury is not sustained by sufficient evidence.

12. For the reason that the verdict of the jury is not sustained by competent evidence.

13. For the reason that the verdict of the jury is contrary to the evidence.

14. For the reason that the verdict of the jury is contrary to law.

15. Errors of law occurring at the trial and duly excepted to be the defendant.

16. Abuse of discretion of the Court in refusing to give the defendant the opportunity to take the deposition of the witness Matthews and show why he did not appear to testify after counsel for plaintiff had insinuated in the presence of the jury that the defendant was responsible for his nonappearance.

17. Abuse of discretion of the Court in refusing to submit the special question requested by the Defendant which reads as follows. "If you find for the plaintiff then state what amount you deduct from the total damage on account of the contributory negligence if any of the deceased Fred Huxoll," to which refusal the defendant at the time excepted.

83 18. Errors of law on the part of the Court in refusing to submit to the jury the special question requested by the defendant which reads as follows: "If you find for the plaintiff then state what amount you deduct from the total damage on account of the contributory negligence if any of the deceased Fred Huxoll" to which refusal the defendant at the time duly excepted.

19. Error of the Court in giving instruction No. 1 on its own motion to which the defendant at the time duly excepted.

20. Error of the Court in giving Instruction No. 2 on its own motion to which the defendant at the time duly excepted.

21. Error of the Court in giving Instruction No. 3 on its own motion to which the defendant at the time duly excepted.
22. Error of the Court in giving Instruction No. 4 on its own motion to which the defendant at the time duly excepted.
23. Error of the Court in giving Instruction No. 5 on its own motion to which the defendant at the time duly excepted.
24. Error of the Court in giving Instruction No. 6 on its own motion to which the defendant at the time duly excepted.
25. Error of the Court in giving Instruction No. 7 on its own motion to which the defendant at the time duly excepted.
26. Error of the Court in giving Instruction No. 8 on its own motion to which the defendant at the time duly excepted.
27. Error of the Court in giving Instruction No. 9 on its own motion to which the defendant at the time duly excepted.
28. Error of the Court in giving Instruction No. 10 on its own motion to which the defendant at the time duly excepted.
29. Error of the Court in giving Instruction No. 11 on its own motion to which the defendant at the time duly excepted.
30. Error of the Court in giving Instruction No. 12 on its own motion to which the defendant at the time duly excepted.
31. Error of the Court in giving Instruction No. 13 on its own motion to which the defendant at the time duly excepted.
84 32. Error of the Court in giving Instruction No. 14 on its own motion to which the defendant at the time duly excepted.
33. Error of the Court in giving Instruction No. 15 on its own motion to which the defendant at the time duly excepted.
34. Error of the Court in giving Instruction No. 16 on its own motion to which the defendant at the time duly excepted.
35. Error of the Court in giving Instruction No. 19 on its own motion to which the defendant at the time duly excepted.
36. Error of the Court in giving Instruction No. 25 on its own motion to which the defendant at the time duly excepted.
37. Errors of the Court in giving Instruction No. 26 on its own motion to which the defendant at the time duly excepted.
38. Errors of the Court in giving Instruction No. 27 on its own motion to which the defendant at the time duly excepted.
39. Errors of the Court in giving Instruction No. 28 on its own motion to which the defendant at the time duly excepted.
40. Error of the Court in giving Instruction No. 29 on its own motion to which the defendant at the time duly excepted.
41. Error of the Court in giving Instruction No. 30 on its own motion to which the defendant at the time duly excepted.
42. Error of the Court in refusing to give Instruction No. 1 requested by the defendant to which the defendant at the time duly excepted.
43. Error of the Court in refusing to give Instruction No. 2 as requested by the defendant to which the defendant at the time duly excepted.
44. Errors of the Court in refusing to give Instruction No. 3 requested by the defendant to which the defendant at the time duly excepted.

45. Errors of the Court in refusing to give Instruction No. 4 r
quested by defendant to which the defendant at the time dul
excepted.

85 46. Error of the Court in refusing to give Instruction N
5 requested by the defendant to which the defendant at t
time duly excepted.

47. Error of the Court in refusing to give Instruction No. 6 r
quested by the defendant to which the defendant at the time du
excepted.

48. Error of the Court in refusing to give Instruction No. 7 r
quested by the defendant to which the defendant at the time du
excepted.

49. Error of the Court in refusing to give Instruction No. 8 r
quested by the defendant to which the defendant at the time du
excepted.

50. Error of the Court in refusing to give Instruction No. 9 r
quested by the defendant to which the defendant at the time du
excepted.

51. Error of the Court in refusing to give Instruction No. 10 r
quested by the defendant to which the defendant at the time du
excepted.

52. Error of the Court in refusing to give Instruction No. 11 r
quested by the defendant to which the defendant at the time du
excepted.

53. Error of the Court in refusing to give Instruction No. 12 r
quested by the defendant to which the defendant at the time du
excepted.

54. Error of the Court in refusing to give instruction No. 13 r
quested by the defendant to which the defendant at the time du
excepted.

55. Error of the Court in refusing to give instruction No. 14 r
quested by the defendant to which the defendant at the time du
excepted.

56. Error of the Court in refusing to give instruction N

86 15 requested by the defendant to which the defendant at t
time duly excepted.

57. Error of the Court in refusing to give Instruction No. 16 r
quested by the defendant to which the defendant at the time du
excepted.

58. Error of the Court in refusing to give Instruction No. 17 r
quested by the defendant to which the defendant at the time du
excepted.

59. Error of the Court in refusing to give Instruction No. 18 r
quested by the defendant to which the defendant at the time du
excepted.

60. Error of the Court in refusing to give Instruction No. 19 r
quested by the defendant to which the defendant at the time du
excepted.

61. Error of the Court in refusing to give Instruction No. 21 r
quested by the defendant to which the defendant at the time du
excepted.

62. Error of the Court in refusing to give Instruction No. 22 requested by the defendant to which the defendant at the time duly excepted.

63. Error of the Court in refusing to give Instruction No. 23 requested by the defendant to which the defendant at the time duly excepted.

64. Error of the Court in refusing to give Instruction No. 24 requested by the defendant to which the defendant at the time duly excepted.

65. Error of the Court in refusing to give Instruction No. 25 requested by the defendant to which the defendant at the time duly excepted.

66. Error of the Court in refusing to give instruction No. 26 requested by the defendant to which the defendant at the time duly excepted.

67. Error of the Court in refusing to give Instruction No.
87 28 requested by the defendant to which the defendant at the time duly excepted.

68 Error of the Court in refusing to give Instruction No. 30 requested by the defendant to which the defendant at the time duly excepted.

69. Error of the Court in refusing to give Instruction No. 33 requested by the defendant to which the defendant at the time duly excepted.

70. Error of the Court in refusing to Give Instruction No. 35 requested by the defendant to which the defendant at the time duly excepted.

71. Error of the Court in refusing to give Instruction No. 36 requested by the defendant to which the defendant at the time duly excepted.

72. Error of the Court in refusing to give Instruction No. 38 requested by the defendant to which the defendant at the time duly excepted.

73. Error of the Court in refusing to give Instruction No 39 requested by the defendant to which the defendant at the time duly excepted.

74. Error of the Court in refusing to give Instruction No. 40 requested by the defendant to which the defendant at the time duly excepted.

75. Error of the Court in refusing to give Instruction No. 41 requested by the defendant to which the defendant at the time duly excepted.

76. Error of the Court in refusing to give Instruction No. 42 requested by the defendant to which the defendant at the time duly excepted.

77. Error of the Court in refusing to give Instruction No. 43 requested by the defendant to which the defendant at the time duly excepted.

78. Error of the Court in refusing to give Instruction No.
88 requested by the defendant to which the defendant at the time duly excepted.

79. Error of the Court in refusing to give Instruction No. 46 requested by the defendant to which the defendant at the time duly excepted.

80. Error of the Court in refusing to give Instruction No. 47 requested by the defendant to which the defendant at the time duly excepted.

81. Error of the Court in refusing to give Instruction No. 32 requested by the defendant to which the defendant at the time duly excepted.

Affidavits will be prepared and filed in support of this motion on behalf of the defendant.

EDSON RICH,
B. W. SCANDRETT,
W. P. MILES, AND
E. C. STRODE,
Atty's for Defendant.

Endorsed: 47-76. In the District Court Lancaster County, Nebraska. Ella Huxoll, Plaintiff, vs. U. P. R. R. Co., Defendant—Motion For New Trial—Clerk's Office District Court Lancaster County, Nebraska. Filed Oct. 25, 1913. J. S. Baer, Clerk Dist. Court.

Journal Entry.

That on the 8th day of November A. D. 1913 (that being the 35th Judical day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 77 to-wit:

47-76

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

This cause now comes on to be heard on the motion of the defendant, by its attorneys, to set aside the verdict of the jury
89 heretofore returned and entered herein, and for a new trial of this cause, and is submitted to the Court, on due consideration whereof the court doth overrule said motion to which the said defendant duly excepts, and is hereby given forty days from the rising of Court to prepare bill of exceptions.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff in the above entitled action is hereby notified that the defendant intends appealing the above cause to the Supreme Court of the State of Nebraska.

EDSON RICH,
E. C. STRODE,
W. P. MILES, AND
B. F. SCANDRITT.

Endorsed: 47-76. District Court Lancaster Nebraska. Ella Huxoll, Administratrix of estate of Fred J. Huxoll, decreased, Plaintiff vs. Union Pacific R. R. Co., Defendant—Notice of Appeal Clerk's Office District Court Lancaster County, Nebraska—Filed Nov. 8, 1913, J. S. Baer, Clerk Dist. Court.

Undertaking on Appeal.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

90 Know all men by these presents: That we, Union Pacific Railroad Company as principal, and National Surety Company as surety, are held and firmly bound unto Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, in the penal sum of $41,000.00 for the payment of which well and truly to be made we hereby bind ourselves our successors and assigns.

Whereas, on the 24th day of October, 1913, judgment was rendered in the District Court of Lancaster County, Nebraska, in favor of Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased and against Union Pacific Railroad Company, for the sum of $20,000.00 in an action therein pending wherein Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, was plaintiff and Union Pacific Railroad Company was defendant, and whereas said Union Pacific Railroad Company intends to appeal said cause to the Supreme Court of the State of Nebraska.

Now therefore, the condition of this obligation is that if said Union Pacific Railroad Company shall prosecute its appeal herein without delay and pay all condemnation money and costs which may be found against it on the final determination of said cause in the Su-

preme Court then this obligation shall be null and void, otherwise to remain in full force and effect.

Dated this 6th day of November, 1913.

UNION PACIFIC RAILROAD COMPANY,
By EDSON RICH, *Its Attorney.*
[SEAL.] NATIONAL SURETY COMPANY,
By HARRY L. MALLO, *Its Attorney in Fact.*

November 8, 1913: This within bond approved as to form this 8th day of Nov., 1913, and surety.

[SEAL.] J. S. BAER,
Clerk Dist. Court.

91 Endorsed: 47-76. In the District Court of Lancaster County, Nebraska, *Lancaster County, Nebraska*—Ella Huxoll, administratrix of the Estate of Fred J. Huxoll, deceased, Plaintiff, vs. Union Pacific Railroad Company, Defendant—Undertaking on Appeal—Clerk's Office District Court Lancaster Count-, Nebraska—Filed Nov. 8, 1913. J. S. Baer, Clerk Dist. Court.

92 *Certificate.*

STATE OF NEBRASKA,
Lancaster —, ss:

I, J. S. Baer, Clerk District Court Third Judicial District of Nebraska in and for the County of Lancaster do hereby certify that the above and foregoing is a true and correct transcript of Petition—Demurrer—Answer—Reply—Motion for Leave to Ament Petition—Exceptions to Depositions—Amendments to Answer—Special Interrogatory Submitted by Defendant—47 Instructions Requested by Defendant—30 Instructions of Court—1 Additional Instruction of Court—Defendant's Exceptions to Instructions—Motion for New Trial—Notice of Appeal—Undertaking on Appeal, with all endorsements on each, with Ruling on Demurrer—Leave to Defendant to Plead—Ruling on Motion to Strike—Journal Entry of October 23, 1913—Judgment, and Ruling On Motion for New Trial, in a cause in said Court wherein Ella Huxoll Adm'x etc. is plaintiff and Union Pacific Railroad Company is defendant as the same appears fully upon the records and files of said Court and now in my charge remaining as clerk aforesaid.

I Further Certify that the Bill of Exceptions hereto attached is the original Bill of Exceptions filed in my office in the above entitled action.

Witness my hand and seal of said Court at Lincoln this 13 day of Nov. A. D. 1913.

[SEAL.] J. S. BAER, *Clerk Dist. Court.*
By W. C. BURCHAM, *Deputy.*

Trans. Fees, 26.70.
Pd. by E. C. Strode.

3 Endorsed: 18377. Huxoll, Adm'x, vs. U. P. R. R. Co. Transcript. Supreme Court of Nebraska. Filed Nov. 14, 913. H. C. Lindsay, Clerk.

4 And on the same day there was filed in the office of the clerk of said supreme court a certain Præcipe, in the words nd figures following, to-wit:

TATE OF NEBRASKA:

ELLA HUXOLL, Adm-., etc.,
v.
UNION PACIFIC RAILROAD COMPANY,

Præcipe.

'o the Clerk of said Court:

Please docket the enclosed transcript of record as an appeal from judgment rendered on the 24th day of October 1913, in a certain ause in the District Court of Lancaster county, wherein Ella Huxoll, dm-. etc. was Plaintiff, and Union Pacific Railroad Company was)efendant.

You will designate the above named defendant as Appellant, and he above named plaintiff as Appellee.

Issue notice of appeal for above named Appellee.

EDSON RICH,
W. P. MILES,
B. F. SCANDRETT, AND
E. C. STRODE,
Attorneys for Appellant.

Endorsed: General No. 18377. Supreme Sourt State of Nebraska. Huxoll, Admx. v. U. P. R. R. Co., Præcipe. Supreme Court of Nebraska. Filed Nov. 14, 1913. H. C. Lindsay, Clerk.

And on the same day there was made to issue out of the office of he clerk of said supreme court a certain Notice of Appeal, in the vords and figures following, to-wit:

5 *Notice of Appeal.*

THE STATE OF NEBRASKA, *ss:*

To the Sheriff of the County of Lancaster:

You are hereby commanded to notify Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased That an appeal has been taken to the Supreme Court of the State of Nebraska by Union Pacific Railroad Company asking the reversal of a judgment against it rendered on the 24 day of October A. D. 1913, in a certain cause

in the District Court of Lancaster County, wherein Ella Huxoll, Admx. &c., was Plaintiff, and Union Pacific Railroad Company Defendant.

You will make due return of this notice, on or before thirty days after the date hereof.

Witness my hand and the Seal of said Court, at the City of Lincoln, this 14 day of November 1913.

[SEAL.] H. C. LINDSAY, *Clerk*,
By VICTOR SEYMOUR, *Deputy*.

Endorsed: General No. 18377. Supreme Court State of Nebraska. Huxoll, Admx. v. Union P. R. Co. Notice of Appeal Nov. 14 1914 fixed as Rule Day, as provided for under Rule Nine. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 15th day of November, 1913, said Notice of Appeal theretofore issued out of the office of the clerk of said supreme court was returned and filed in the office of said clerk with service thereof acknowledged, in the words and figures following, to-wit:

96 Service of the within Notice of Appeal acknowledged this 14th day of November 1913.

ELLA HUXOLL,
Administratrix of the Estate of
Fred J. Huxoll, Deceased, Appellee,
By WILMER B. COMSTOCK,
Attorney.

Endorsed: Supreme Court of Nebraska. Filed Nov. 15 1913. H. C. Lindsay Clerk.

And afterwards, to-wit, on the 7th day of April, 1914, there was filed in the office of the clerk of said supreme court a certain Bill of Exceptions, in the words and figures following, to-wit:

97 In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.
Notice to Ella Huxoll, Administratrix.

You are hereby notified that at 9 A. M. on Friday, the 20th day of March, 1914 or as soon thereafter as the same can be heard, the defendant will present the Bill of Exceptions in the above entitled cause to the Hon. P. Jas. Cosgrave for settlement of said Bill of Exceptions, at which time said defendant will object to the amendments suggested by the plaintiff on March 11, 1914.

E. C. STRODE,
EDSON RICH,
W. P. MILE,
Att'ys for Defendant.

Received copy of within notice and acknowledge service thereof this 13th day of March, 1914.

WILMER B. COMSTOCK.

I, J. S. Baer, clerk of the district court of Lancaster county, within the third judicial district of Nebraska, do hereby certify that this is Volume I, of the original bill of exceptions consisting of two volumes filed in the office of said clerk in said cause.

In testimony whereof, I hereunto set my hand, and affix the official seal of said court, this 20 day of March, 1914.

J. S. BAER,
Clerk District Court,
By W. C. BURCHAM, *Deputy.*

98 Received of Defendant, for examination and amendment, a draft of a bill of exceptions of which this is Volume One in the following case of Ella Huxoll, Admx. etc., plaintiff, vs. Union Pacific Railroad Company, defendant, tried in the district court of Lancaster County, at the September, 1913, term.

Dated, March 2, 1914.

[SEAL.] WILMER B. COMSTOCK,
Attorney for Plaintiff.

I herewith return the draft of the bill of exceptions in the case of Ella Huxoll, Adm'x, etc., plaintiff, vs. Union Pacific Railroad Company, defendant, submitted on the 2nd day of March 1914, and propose amendments thereto as follows: As shown by typewritten sheet hereto attached. Dated, March 11, 1914.

WILMER B. COMSTOCK,
Attorney for Plaintiff.

That amendments to the bill of exceptions in the case of Ella Huxoll, Adm'x. vs. Union Pacific Railroad Company be made as follows:

1. That all of page 217 after the name "Mr. Strode" appears for the last time on said page, all of page 218, and that portion of page 219 down to the first word "overruled" on said page, be eliminated, for the reason that the same was not made in the record at the time the trial was being had, and is not a part of the oral proceedings at the time of the trial, and that the same language above referred to, as appearing on pages 217 and 218-219, which occurs on pages 219 to 265, inclusive, be eliminated for the reason that the said statements did not occur at the trial and at the time of the trial were not made a part of the record at the time the record was made.

99 2. Substitute the word "know" for the word "thought" in line 4 from the bottom of page 435.

3. That immediately before the words "Mr. Comstock" on the last line on page 442, the following be inserted: "Mr. Comstock: 'The plaintiff offers in evidence Rule No. 9 on page 12 of Exhibit 3.' Mr. Strode: 'The defendant objects to that offer as incompetent,

irrelevant and immaterial.' Overruled. Exception. The rule referred to and offered by Mr. Comstock, received in evidence and read to the court and jury as follows: 'Night signals must be displayed from sunset to sunrise. When weather or other conditions obscure day signals, night signals must be used in addition.' "

Dated this 11th day of March, 1914.

WILMER B. COMSTOCK,
Attorney for Plaintiff.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Adm'x, etc.,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

Defendant's Bill of Exceptions.

Be it remembered that on the trial of this cause in the district court of Lancaster County, Nebraska, before Honorable P. Jas. Cosgrave one of the judges of said court, and a jury, at the September, 1913, term thereof, to-wit: on the 14th to the 23rd inclusive days of October, 1913, the following evidence and testimony was introduced, and given to the court and jury, by the plaintiff and in her behalf and by the defendant and in its behalf, together with the objections of the said parties to the introduction thereof, the rulings of the court thereon, and the exceptions of the said parties thereto by them respectively noted, as hereinafter set forth, in Two Volumes of which this is Volume One.

Appearances: Stout & Rose; Hogland & Hogland; W. B. Comstock, appearing as attorneys for plaintiff, and Strode & Beghtol; E. P. Miles, and Scandrett appearing as attorneys for defendant.

October 14th, 1913.—9:30 A. M. Court met, present as appears on the title page hereof, and the following proceedings were had and done.

(*During the Examination of the Jury.*)

W. H. CLARK, being examined as a prospective juryman.

By Mr. Comstock:

Q. I think you said, Mr. Clark, that you had been in the service of railroads practically all your active life?

A. Yes sir.

Q. And you are now employed by the Rock Island Railroad as a conductor?

A. Yes sir.

Q. And that you have fixed ideas and impressions concerning damage suits against railroad companies?

A. Well no, I can't say that I have. In some cases probably, and in others not.

Q. You have an opinion concerning them haven't you,—a fixed opinion, Mr. Clark?

A. No, I haven't.

101 Q. Did you hear what I said Mr. Clark, when I asked you the question first?

A. What is that?

Q. You do not hear very well do you,—you are quite hard of hearing?

A. No sir.

Q. Well, wouldn't your long service as a railroad man incline you to the opinion that would be favorable to a railroad in a suit of this kind?

Mr. Strode: The defendant objects to that question as an improper question.

Sustained. Exception.

Q. You have an opinion about these suits against railroads generally?

A. No sir, I have no opinion.

Q. How is that?

A. I have no opinion.

Q. You have no opinion whatever?

A. You asked me if I had an opinion?

Q. About these cases generally?

A. No, I can't say that I do.

Q. Well, can you say you haven't?

A. No, I have no opinion about these cases.

Q. You have no impression favorable or unfavorable to these cases generally?

A. No sir.

Q. How long have you lived in Lincoln?

A. About 28 years.

Q. And during that time were you working for these other railroads?

A. Yes sir.

102 Q. What is your age?

A. 32.

Q. Were you ever a juror in this kind of a case before?

A. No sir.

Q. Were you ever a juror before this term?

A. No sir, not before this panel.

Q. Are you acquainted with any of the officers of the Union Pacific Railroad Company?

A. Yes sir, I know a couple.

Q. Who?

A. I know Bob Clancy,—R. J. Clancy in Omaha, I think he is in the law department. I do not know what department he is in, really.

Q. He is the lobbyist?

A. He used to be here in the state house.

Q. He is employed frequently about the state house, by the Union Pacific, especially when the legislature is in session?
A. Yes sir.
Q. You are acquainted with him?
A. Yes sir.
Q. Personally a*d*quainted?
A. Yes sir.
Q. Intimately acquainted?
A. No sir, just personally acquainted with him.
Q. Would your acquaintance with him influence you as a juror,—wouldn't that have a little effect in this suit against his railroad?
A. (No answer.)

103 Q. Who else are you acquainted with in the service of the Union Pacific?
A. Some of the boys who did work there.
Q. Are you acquainted with Mr. Strode?
A. Just by sight.
Q. How long have you known him?
A. Ten or twelve years by sight.
Q. Has he ever done any business for you?
A. No sir.
Q. Now Mr. Clark in a suit where a man was run down by an engine on the railroad, wouldn't the fact of your long service as a trainman, cause you to have an impression at the outset of a lawsuit?

Mr. Strode: The defendant objects to that question as immaterial, incompetent, and it is indefinite as to what he means by "run down."
Overruled. Exception.

A. No sir, I do not think it would.
Q. Have you talked to anybody about this lawsuit Mr. Clark?
A. I can't understand you?
Q. Well you don't hear well?
A. No sir.

Mr. Comstock: The plaintiff challenges this juror for cause on the grounds of his hearing.
The Court: Sustained. Upon the grounds of not having good hearing. I think that objection is good.
Exception.

104 Juror VAN ANDEL, during the course of his examination, as a prospective juror.

By Mr. Comstock:

Q. Are you for or against such suits as this?

Mr. Strode: The defendant objects to that question as an improper question. No ruling.
(Question withdrawn.)

Q. Well, have you any impression at the outset of the trial, Mr. Van Andel, that makes you look with favor or disfavor on this suit?
A. Well, I can't say that I do.

Q. Can you say that you do not?
A. Well I used to railroad,—I used to be a railroad man,—and the impression that I have would have to be removed before I could,——
Q. Where were you employed as a railroad man?
A. The Union Pacific.
Q. Where?
A. At Evanston, Wyoming.
Q. In recent years?
A. No sir.
Q. In what capacity?
A. In the shops,—machine shops and an engine man.
Q. Were you fireman or engineer?
A. Fireman.
Q. And this service for this railroad company, causes you to have impressions that would require evidence to remove?
A. Yes sir.

105 Q. So that if you were selected as a juror, you would enter upon the trial with an opinion that would require some evidence to change?
A. Yes sir.
Q. And those are fixed opinions that would require some evidence to remove?
A. Yes sir.

Mr. Comstock: We challenge the juror for cause.
Mr. Strode: The defendant resists the challenge upon the ground that these opinions of his, are not shown to be in regard to matters in this lawsuit.

By the Court:

Q. From your experience as an employee on a railroad heretofore, as stated by you, from your experience in general, and observations, and the statements made to you, of the nature of this action, the court now asks you, have you now an opinion, and an opinion of such a degree in your own mind that it would require evidence to remove the same, before you enter into this suit as a juror?
A. I certainly would.
Q. Is that opinion as the result of your observations and experience in railroading heretofore, in cases of this kind, Mr. Van Andel?
A. Yes sir.

Challenge sustained.
Mr. Strode: I would like to examine the juror to make a record. Leave granted.

By Mr. Strode:

106 Q. Mr. Van Andel, you understand from this case, that was an engineer that was killed?
A. Yes sir.
Q. Out on the railroad track?
A. Yes sir.
Q. Now, without knowing anything about how it happened, or

what was the matter, or why it happened, can you say, or do you say that you have any opinion concerning the merits of this lawsuit?

A. No sir.

Q. And if it turns out, that this is a lawsuit about a man getting killed upon a railroad track, and the evidence shows you he got killed, and how it happened, would you have any opinion that would interfere with your deciding the case, upon the evidence that is offered here, toughing the matter as to how he got hurt, under the instructions of the court as to the law?

A. Well, I would decide it according to the evidence.

Q. And if the evidence was offered to you, upon this trial, as to how this man got hurt, and why he got hurt, would you be governed by the evidence that is offered here, and upon questions touching the matter of how and why he got hurt?

A. Yes sir.

Q. And would you be governed by the instructions of the court as to what the law would be considering those to be the facts?

A. Yes sir.

Q. Your opinion that you refer to is the opinion that any man would have that is or has worked around a railroad, or worked for one?

A. Yes sir.

Q. But has it anything to do about how this man got hurt or caused him to be hurt?

A. No sir.

Q. Or anything to do with this lawsuit?

107 A. No sir.

By Mr. Comstock:

Q. But notwithstanding all that, Mr. Van Andel, your experience as a railroad man, causes you to have an opinion concerning the merits of these cases generally, that would require some evidence to remove when you start into the trial wouldn't it?

A. I think so.

Mr. Comstock: We renew the challenge.

Mr. Strode: The defendant resists the challenge.

By Mr. Strode:

Q. You understand Mr. Van Andel, that if you are taken as a juror, that you would be expected to try this case on the evidence?

A. Yes sir.

Q. And that you would be expected to leave out of consideration anything that was not offered in evidence?

A. Yes sir.

Q. That you might know of here?

A. Yes sir.

Q. And if you are taken as a juror here, would you undertake to try the case upon the evidence?

A. I would try the case upon the evidence.

Q. By what the witnesses testify here about it?

A. Yes sir.

Q. And decide it that way?
A. Yes sir.
Q. Would you be influenced not knowing anything about how it has happened, at the start or close of this case, by any impressions or opinions you have touching railroads generally?
A. No sir.
Q. You would try this case, upon what the evidence shows this case to be?
A. Yes sir.
108 Q. Now in considering that evidence, would you consider it the same as any trial?
A. The same.

By the Court:

Q. I do not believe you understood the questions before. Do you know of any reason why you should not sit as a juror in this case?
A. None whatever.

Mr. Rose: (Argument.)
The Court: I think I will let the decision stand.
Sustained. Exception.

Juror BARNES, during his examination as a prospective juror, upon examination.

By Mr. Comstock:

Q. Would the fact that you had operated these engines and cars, and had experience with persons on the track, tend to create impressions as to the rights of the different parties that might cause you to have some feeling in cases like this?
A. I do not think so.
Q. Do you know Mr. Strod?
A. I never saw the man until this morning.
Q. Do you know whether he is the lawyer for the Collins Bros. concern, for which you work?
A. I do not.
Q. Do you know his partner or associate, Mr. Beghtol?
A. No sir.
Q. Are you acquainted with any of the lawyers here representing this railroad company?
A. No sir.
109 Q. Are you acquainted with any of the officers or agents of this defendant?
A. No sir.
Q. Do you think the fact that you have been an operator of engines and cars would not make any impression that would require evidence to remove in this case?
A. I do not think so.
Q. Were you ever a juror in a case like this?
A. No sir.
Q. Do any of your immediate relations work for the Union Pacific Railroad?

A. Not to my knowledge.
Q. Or any railroad?
A. I have a brother working for the Burlington.
Q. In what capacity?
A. Fireman.
Q. Does he live in Lincoln now?
A. No sir.
Q. Where is he employed?
A. At McCook.

Juror STODDARD, during his examination as a prospective juror.

Examination by Mr. Comstock:

Q. You are a regularly licensed attorney at law?
A. Yes sir.
Q. Admitted to practice in the district courts of the State of Nebraska?
A. Yes sir.
Q. And the Supreme Court?
A. Yes sir.

Mr. Comstock: The plaintiff challenges the juror for cause.

Mr. Strode: The defendant resists the challenge for the
110 reason that it is not a grounds for challenge for cause,—a peremptory challenge under the statute.

The Court: Plaintiff having challenged juror Stoddard on the grounds that he having been heretofore admitted as a licensed attorney to practice in the general courts of the State of Nebraska, and said challenge being upon that ground alone, the challenge is overruled.

Plaintiff excepts.

It now being 12 o'clock Noon, October 14th, 1913, court adjourned to meet at 2 o'clock P. M. The same day.

Two o'clock P. M. October 14th, 1913. Court met pursuant to adjournment, and the following proceedings were had and done.

Juror REIMER, during his examination as a prospective juror.

Examination by Mr. Strode:

Q. Upon any disputed question of fact, wherein the plaintiff has the burden of proof, that is, where the plaintiff, must prove by a preponderance of the evidence, that fact that is in dispute, here, if you had any doubt in your mind as to whether that fact had been proven by the railroad company to be contrary to what it was claimed upon the part of the plaintiff, would you have any hesitation or would you be disposed to give the plaintiff the benefit of the doubt?

Mr. Comstock: The plaintiff objects to that question as not proper. Sustained. Exception.

Q. If it should develop upon the trial, Mr. Reimer, that one of the disputed questions of fact here is how fast this engine was running, and you felt from the testimony and were satisfied from the evidence that is offered here, that evidence upon that question was evenly balanced, you would or would you be disposed under
111 that situation to give the widow and the child the benefot of the testimony, and find for her, upon that disputed question of fact?

Mr. Comstock: The plaintiff objects to that question as an improper question, to ask a joror in his voir dire examination.

Sustained. Exception.

Q. If the court should tell you in his instructions, Mr. Reimer, that the burd n of proof on the question of what the speed of this engine was, was upon the plaintiff, and that the plaintiff must prove by a preponderance of the evidence the rate of speed alleged in her petition, and you were satisfied from the evidence that there was just as much evidence to the contrary, against her claim on that point, you would be disposed to give the plaintiff the benefit of the doubt upon her side, and find for her?

Mr. Comstock: The plaintiff objects to the question as improper.

The Court: I will permit the juror to answer that question, and also permit the plaintiff to further qualify him.

Overruled. Exception.

A. I do not think I would.

Q. You think that you can eliminate, if you are taken as a juror, you can eliminate, not considering this testimony the one question of fact, that is, that she is a widow, and has two children, suing a railroad, and you will do that if you are taken as a juror?

A. I do not believe I catch that.

Q. That is, if you are taken as a juror, here, to be a judge of the facts in this trial, in considering the facts as developed here on the trial, would you lay aside and out of consideration, the fact that this woman is a widow, and has two children, and decide it just the same as you would if it was between two men?

A. That is the way I would decide it as if it was between two men.

Q. Now, Mr. Reimer, if it should develope under the instructions of the court, and from the evidence that the man who was killed, was walking down the main track of the railway, would you have
112 any hesitation in finding that that was the act of contributory negligence, if you believe it to be such from the evidence. Would you hesitate to do that, or have any hesitation about it?

A. No sir.

Q. You would not?

A. No sir.

Q. Has anybody talked to you about this case?

A. No sir.

Q. Are you acquainted here about the city?

A. Yes sir, some.

Q. And you know Mr. Comstock?

A. No sir.
Q. Do you come up here to buy, to do your buying?
A. A good bit of it.
Q. Do you get your automobiles from here, or through a factory, Mr. Reimer?
A. I get some from here, and some from Omaha?
Q. Whom do you deal with here?
A. Mr. Hebb.
Q. What kind of an automobile do you sell?
A. The Ford and the Oakland.

Examination of jurors concluded. Jury impanelled, and sworn. And opening statements to the jury made.

Opening Statement of Mr. Comstock on Behalf of the Plaintiff.

If the Court Please: Gentlemen of the Jury:

113 As I stated briefly before commencing the examination here gentlemen, to determine your qualifications, to act as jurors, I told you the title of this case, and briefly what it is about. Under the statutes of this state, it is the practice and the procedure before the commencement of the introduction of the evidence, for counsel upon each side of the case to state briefly the issues involved, and the evidence by which they expect to establish these issues, to state the case as presented by her, and the evidence by which she will expect to maintain that issue.

On the 1st day of January, 1911, Fredrick Huxoll, then a man of twenty-nine years of age, in perfect health, was in the employ of the Union Pacific Railroad Company, as a locomotive engineer, having been in the service of that company, in that capacity, I think for some three or four years. The evidence will show that he was earning at that time, a monthly salary of from $165 to $195 per month. That he was a married man, having a wife and two children. Ella Huxoll, the administratrix of his estate, and the plaintiff in this suit, being his wife, then, I think about 28 years of age, and two little children, a little girl I think the evidence will show about three or four years of age at the time of his death named Mary, and the little boy a year and a half or two years of age, named Fredrick.

Mrs. Huxoll is the lady sitting there by the window, (indicating) with the little boy in her arms,—he is one of the children, and the little girl sitting there with the red hood is the other. The suit is brought to recover damages against the Union Pacific Railroad Company, resulting to this widow and these fatherless children on account of the death of Mr. Huxoll. Mr. Huxoll, I think the evidence will show, came in on a run on his engine, into the town of Sid-
114 ney, in Cheyenne County, in this state, sometime during the 31st day of December, 1910, and on the morning of January 1, 1911, he was called to take an engine and to proceed two or three stations east of the town of Sidney, to assist in bringing a freight

train west from this station, called Perdue, that was unable by its own engine, to further proceed on the road.

During the night of December 31st, 1910, there arose a terrific storm. Some of you gentlemen perhaps are familiar with the situation, and remember the occurrence. The wind blew a gale from the northwest and there was some snow in the air and it was terrifically cold, the thermometer I think the evidence will show being 12 to 15 degrees below zero. On that morning, Mr. Huxoll was called to report to take his engine to proceed eastward to this town of Perdue to bring this train, laden with merchandize and freight, what they call the California Special, or the California through train, carrying goods and merchandize through this state, to Los Angeles, San Francisco, Ogden, Salt Lake City, and points in Oregon, Colorado, and other states, and was engaged in Inter-State Commerce, hauling traffic through the country from one state to the other. This train was stalled at the little station of Perdue, two or three stations east of the city of Sidney. Huxoll was called to take an engine and proceed eastward there, to help pull this train into the town of Sidney. He proceeded to the wash house in these railroad yards,—the evidence will show that these yards are lengthwise, east and west,—the station building is pretty well to the west end of these yards, and just a short distance east of the station and a little to the north is what they call the wash house. Right east of the wash house is the round house, and a little south and east of the wash house, is the turn table, where engines are put onto this turn table and turned around. From this turn table into the round house, there are innumerable tracks.
115 I think the evidence will show something like 20 or more, passing from this turn table into the round house. This round house and turn table stands between the wash house and the water crane, which is some two or three hundred feet or such a distance east of the turntable and wash house.

The engine that Mr. Huxoll was expected to take and run eastward to this village of Perdue, stood a little east of this water crane. There was one engine standing at the water crane, and one engine standing west of the water crane on what they call the spot track,—a track that proceeds from the round house and turn table to the east, and on to the south, out on the north side of the water crane, and on eastward where it connects with the main line. The main line of the Union Pacific Railroad Company at that point is about twenty five feet or so south of the turn table, and passes on the south side of the water crane, or main line on the south side, about six feet from the water crane, and this spot track where the engine stands preparatory to its being taken out on the road on the north side of this water crane, about the same distance, so that engines can pass along on either track and receive water from this water crane. The main track about six feet on the south side, and the spot track about six feet on the north side of this water crane.

The evidence will show that Mr. Huxoll in obedience to the *to the* specific acts of his master, this railroad company, on that morning, proceeded to this wash house, changed his clothing, and proceded to go to this engine, then standing on this spot track, on

the north side of this water crane, and a little east of the water crane. The evidence will show that to have passed on the north side of this turn table, he would have had to cross nineteen railroad tracks running into the round house. He would have had to cross another track at least, a switch track coming into the round house from the east. And he would have had to have gotten around, in some manner, two engines that stood on the spot
116 track between his engine and the wash house. On the other hand by going to the south of the turn table, he could pass around the end of it, and have a path between the main line track and between the spot track, unobstructed by railroad track.

The evidence will show that he took that path. And he proceeded eastward toward his engine, until he approached this water crane, that stood between this spot track and the main line track, and the total distance between these two tracks was in all, only thirteen feet. When he approached this water crane, the evidence will show that he turned to the right because about this watercrane there was a glare of slippery ice, covering the spot,—the distance between these two tracks, the main track and the spot track, and the evidence will show that in response to the instincts of the human race, to protect his health,——

Mr. Strode: Now if this is to be argued now, all right.

We are ready to argue it, or if it is to be a statement of what the evidence is to be, a fair statement of what the law contemplates shall be made, all right. But unless the court directs otherwise we shall object to an argument being made now to this jury, beyond a mere statement of what the evidence is to be.

The Court: Confine yourselves to a simple statement of what the evidence will be.

Mr. Comstock: The evidence will show gentlemen, that when Mr. Huxoll approached this water crane, on account of the ice that obstructed his passage, between these two tracks and two engines standing upon the spot tracks, that prevented his passage to the left of the water crane, on the north, he turned to the right, the only open way he had to pass around this water crane. And as he stepped on this main line track, in the blinding snow storm, when the undisputed evidence will show you gentlemen, that amidst that cloud of smoke and steam, so dence that the engineer could not see the fireman in his own cab, he undertook to pass around this water crane, in response to the orders of his master, to take his engine, and while so passing around this water crane, the switch
117 engine,—not a switch engine,—no not the switch engine, not a switch engine, but a regular road engine, without any equipment, for switching purposes, without any footboard, for a switchman to stand on the front end, the way it was going, contrary to the rules, and regulations of the railroad, without any appliance that could ring the bell, or without any bell ringing, the bell cord being broken, so that it could not be reached by either engineer or fireman, without any brakes to control its speed, the valve that supplies the steam and the air being frozen up, with no power to control it except a reverse lever. Without any footman on the front

end of it, running at a dangerously reckless rate of speed, when neither fireman or engineer could see the track ahead at all, without sounding the whistle or giving any alarm, of any kind, ran right into that cloud of steam and smoke, and ran down this man Huxoll just about opposite this water crane, ran seventy-five feet after they hit him, tore one of his arms right out from the shoulder, and left him forty-five minutes beneath that pond-rous engine, while his blood crimsoned the snow on the ground on which he laid.

He was told that the main line would be clear for him between the station of Sidney and the station of Perdue, where he was to meet his train. Where he was to go to bring this commerce back at the bidding of his master.

This action gentlemen, is brought under the Statute of the United States,—the act of Congress, approved on the 22nd day of April, 1908. That Statute provides that whenever an injury to the servant of a railroad,——

Mr. Strode: The defendant objects to this further argument. This is the most remarkable statement that was ever made in this court room. It is not an opening statement of any fact, but it is an
118 argument, and now he proceeds to argue the law.

The Court: Confine your statement of the case to the facts as they present themselves.

Mr. Rose: I think in view of the examination here of the witnesses, and everything, it certainly is proper to let the jury know the liability,—where the injury is caused in whole or in part. There has been a good deal said here in questions, but there is a particular phraseology of that statement,—I suppose that is all Judge Comstock was going to state.

Mr. Comstock: I think I would be just permitted to state the issue that is presented under that statute.

The Court: You may do that.

Mr. Comstock: Under that statute,—this is an action for negligence, gentlemen, and under that statute, it provides that any railroad engaged in Interstate Commerce shall be liable for any injury——

Mr. Strode: The defendant objects to any argument of the statement of the issues under that statute.

The Court: I think I will sustain that objection.

Mr. Comstock: The action is brought gentlemen upon the theory that the railroad is liable wherever the injury occurs——

Mr. Strode: The defendant objects to that further:

The Court: Give the statement of the case here.

Mr. Strode: I invoke the statute of this state which says that an opening statement to a jury shall consist of a plain statement of the facts to be proved on each side.

Mr. Rose: I say that we will test the merits of his objection by the terms of the statute.

The Court: Objection sustained. Plaintiff excepts.

Mr. Comstock: The evidence will show that after lying
119 under this engine for about forty-five minutes, in this awful situation, Mr. Huxoll was extricated and taken to the city of Cheyenne, Wyoming, and there died from his injuries. At the time of his death, he was not only a skilled engineer, but he was qualified by education and training for general business pursuits, and had prospects before him of a long and successful business career. And he had ability and power to accumulate a forture for his widow,—for his wife, and his babies. I think gentlemen, that is some of the main facts that the plaintiff will expect to present as her claim, and to make it look respectable in this court. And when my friend says that all we have is the widow and children, I want to tell you gentlemen, that his railroad made her a widow, and made her children fatherless.

Gentlemen, that is all I have to say at this time.

Opening Statement by Mr. E. C. Strode on Behalf of the Defendant.

If the Court Please: Gentlemen of the Jury:

Judge Comstock advised you that the purpose of the opening statement was to tell you more in detail what the facts would be on the part of the plaintiff, or what the evidence would be, and what it would be on the part of the defendant. The evidence as I understand it, will come in here with reference to two or three points only. That Mr. Huxoll was killed at Sidney, is not in dispute. That he was taken out from under an engine at Sidney, will not be in dispute. That he left a widow and two children, will not be questioned. That he was killed by being run over by an engine will not be in dispute. Those things we all will know when you get this case before you.

But the matter of how it happened and how it came about that he was killed, and the evidence upon those matters which go to who was to blame, if anyone, will be the questions that you will have to pass upon. The question of whether he was killed comes
120 first here, and that is admitted. Now the evidence will show as we understand it, and as I think there can be no question about it, that Mr. Huxoll was an engineer, and so far as I know, a good engineer. I think there will be no question that he was a competent man, in the duty that he had to discharge. There is also another engineer connected with this matter who was also a competent man, and a careful man, and that was Mr. Zimmer. Mr. Zimmer was the man who was operating the switchengine in the yard at Sidney that ran over Mr. Huxoll, and killed him. The evidence will show that Mr. Zimmer didn't see Mr. Huxoll, or he would not have run over him. Nobody saw him, or he would not have been run over. If anyone had seen him there when this switch engine was being operated, he would have been alive, but Mr. Zimmer didn't see him, and didn't know he was there, and the evidence will show that he hadn't any right or reason to expect that he would be there. It wasn't the place for him, or any man to be.

Mr. Zimmer was running his engine on the railroad tracks, the place for an engine to be and this man took his own life in his hands, when he walked down that track, and walked into this engine.

Now you will get down to that before we get through with this, to find out who is to blame. He wasn't deliberately killed,—he wasn't run over by the man or a man who saw him, but he was going down there to his post of duty, as they say, and which is undoubtedly true,—his engine stood out there in the yards at Sidney, on the spot track, a little track that runs out from the round house, where they bring the engines out in the morning and put them there, if he is to go out in the morning,—and stand them there on this little track, and the engineers come and go to their engines and get on them there on the spot track. It lies alongside of the main line, near this water crane they talk about. Mr. Huxoll's engine was there on that spot track, and he was going down there to get it, and he left the wash house to go down to his engine. Now the evidence will show that from the time he passed the turn table that the turn table is between the wash house and the *spto* track, and that
121 this turn table is about a block away from the crane, about the length of the block that this court house is sitting on,—about three hundred feet from the turn table down to that point where his engine stood on this spot track. In that space where he left the turn table was a gravel road bed, as wide as this court room for a man to go upon, with no track upon it, but at that point where that situation lay there, he crossed there to the main line track to the south, of there and walked almost a block between the rails of that main line track, when three feet either side of him was a perfect path and a place of perfect safety; he picked out the one spot where he would walk, where he would be injured, and that track was being used, and being used by switch engines, being used by Mr. Zimmer and his crew,—his engine and this switchman there. They could back along that track to pick up some cars,—it is a cold winter day, this is in the forenoon, almost noon,—between eleven and twelve o'clock and they come back along the main track, backing their engine,—just the engine,—no cars, just the engine,—backing up to pick up to do some work, in the yards. The snow was blinding and there was steam and smoke through there, and Mr. Huxoll undoubtedly didn't see the engine coming, and he got run over — this suit is to blame the railroad company because it didn't see Huxoll when he was between the main line and didn't see the engine. When there was a path right by it for him to walk on,—that is one of the matters that you are going to have to consider is whether with a place of safety provided for him, a path made of Sherman Hill Gravel, that is as smooth as this floor, and he got between the two rails, of the main track, with the ties sticking up, he took the hardest place that he could find to walk in that storm, and because he got hurt by the engine they are here with a claim that the company was to blame and it will come to your attention, before we get through with this law suit, that they brought this suit

four hundred miles away from where it happened,—why? To get it away from the scene of the accident.

122 Mr. Rose: The plaintiff desires to object to that statement and ask that counsel be reprimanded for it as a violation of his own suggestion.

(No ruling.)

Mr. Strode: It will appear in this evidence that Mr. Huxoll was killed at Sidney——

The Court: The law provides they have a right to bring the case whereever they want to Mr. Strode, whereever you have an agent, and I do not think at this time that you should refer to any such condition.

Mr. Strode: I will submit to your honor.

The Court: I will sustain the objection.

Exception.

Mr. Strode: We will be entitled to an instruction upon it. Now the evidence will show that this accident happened at Sidney, and at a town located in the Western part of this state, within some 15 miles of Colorado, and that this woman lives at North Platte, and that she lived there at the time this accident happened, and lives there now. Now whether it will be possible for this jury to see for itself where this man got hurt, where this man got killed, well, we will depend upon the court here, whether he will permit the jury to be taken out there to see it.

Mr. Rose: I take exception to that statement as argumentative, and unjustifiable, in his opening statement and ask that the counsel be reprimanded for injecting it.

Mr. Strode: There certainly is nothing to that to be reprimanded about.

Mr. Rose: I make the request there.

Mr. Strode: If that is an offense, I do not know what constitutes an offense. That is a matter that is to come up later. It is to come up, but it is only upon the question, of what the condition was out there.

123 The Court: It is a matter entirely within the *discussion* of the court, and a matter that must be presented. Go ahead with your statement of the case.

Mr. Strode: Now the evidence will show that Mr. Huxoll was walking down this track, and the engine was backing and that he has his fireman with him, a man by the name of Dupont, who was about ten feet ahead of him, and he was walking on the outside of him, and walking on the path that lay between the main line, and this spot track, which at the turn table was a distance as wide as this room, and as you came down here to the water crane, it came down to a distance of twelve feet, a distance as long as this place is where the jury is sitting here in this jury box,—the distance from that end of it to this end. Between the main line and the spot track an open space there, filled with this Sherman Hill Gravel, for men to walk over. Mr. Dupont walked with him and walked ten feet ahead of him from the time that they left the wash house and will testify as we understand it that when

they got opposite the turn table, which was a block away from that water crane,—almost that,—274 feet,—that Mr. Huxoll got between the rails,—he walked down between the rails,—and when they got up within about twenty feet,—when Mr. Dupont got within about twenty feet of that water crane, he heard this engine coming, and he hollered to Mr. Huxoll, that there was something coming, to look out, and just then the engine struck Mr. Dupont's hand bag, and knocked it out of his hand. He was walking on the outside. Not in between the rails, and that is all the harm that came to Mr. Dupont.

A Juror: Which way was the train running, east or west?

Strode: Backing. He was going,—the engine was coming back west. Meeting him. Mr. Huxoll was walking east, and the engine was coming west, and he ran into the engine, and the engine ran into him. They just came together.

124 A Juror: The reason I can't understand that, is because the other attorney said that the wind was coming from the north west, and it would seem that the wind would blow away the steam and smoke so that you could see that engine.

Mr. Strode: The engine was coming west, and there was steam and smoke across the track, and Mr. Huxoll probably didn't see the engine. He certainly probably would not have stayed between the tracks. The engineer didn't see him, or he would have stopped and not run over him, but they met there. He was between the rails at a point where there was this cloud of steam and smoke, over the track. Where he could not see, and where the engineer could not see any better then he.

Mr. Rose: I think where the juror is mistaken is this: There was smoke coming from the round house,—not the smoke of the engine itself.

Mr. Strode: Yes sir, now there is where it was. Mr. Dupont hollered for Mr. Huxoll to get out of the way, and he hollered a second time, but he didn't get out of the way. Now Mr. Dupont and and all of these people who were there,—here is the engineer Mr. Zimmer, and his fireman, they know how it happened and Mr. Dupont knew, and these other men who were working there,—this was in the yards,—the main track between this point, is a part of the yards, where they do their switching Sidney as you understand, is the division point between Cheyenne and North Platte. Cheyenne in Wyoming, and then comes Sidney the next division point, and then North Platte is another division point. And there is where they housed their engines, and change their crews, and do lots of their switching, and this was a busy switch yards, and this man Zimmer and his men were operating the switch engine. Mr. Huxoll was running on the main line, that is he was running between North Platte and Sidney, and he was going down to get his engine and go down to Perdue. He had nothing to do

125 with operating the switch engine. Now there was another engineer by the name of Orton. This train down to Perdue was stuck in the snow down there, a snow bank it was, and it was cold weather, and there had come up a storm. So they sent an

engine to go down to get it and bring it into Sidney. And Mr. Huxoll and his fireman, and Mr. Orton and his fireman were going to take two engines, known as engines 1909 and 1913, in this case. They were on the way. Mr. Orton and his fireman had gone down this path, and then comes Mr. Huxoll with his fireman going down to the engine, and Mr. Huxoll, gets run over. Now there is a question here that you will have to hear evidence on, and decide what the fact is. A claim is made in this petition, and it is dispited, a disputed question of fact here, that this switch engine was running at an excessive rate of speed, and that is one point, and there will be some testimony offered on the question of how fast that switch engine was going, and if the railroad was negligent is going too fast,—you are going to hear testimony about that. And the railroad claims that engine was being operated somewhere between three, to six or seven miles an hour, or eight,—along there some place. They will content it was being operated at fifteen to twenty miles an hour, and you will get the evidence on that; you will have to find out what the fact is about that. The claim is made, that when the engine was back there, that there wasn't any bell rung, and they will have some evidence of some witness who will testify there wasn't any bell being rung,—and upon this side there will be testimony to the effect that it was being rung, and that Mr. Dupont heard it, and other witnesses who heard it will testify to it. So you will get the question of whether or not the bell was being rung. You will have to find out what the fact is about that. Then, there is a claim here, that there wasn't any bell cord,—the bell cord being broken, the air being frozen, and without brakes.

Now that is the kind of an engine they claim
126 was being operated by Mr. Zimmer. We claim, and we claim that the evidence will show that the engine pulled a train from Cheyenne, and came into that round house, at 4:50, or about 4:30 that morning. Brought a big freight train on with it,—brought in there by Mr. Stewart, turned over to the switchmen, the switching crew that had charge of the yard, at that time. Mr. Parks, and his engineer, operated it from that time until six o'clock in the morning, switching between five and six o'clock that morning, after it was received from Mr. Stewart who brought the engine in that morning from Cheyenne,—and then it was turned over to Mr. Zimmer and Mr. Matthews at six o'clock in the morning, because that is the point where they divide shifts. Six o'clock in the morning until six o'clock in the evening, and six o'clock in the evening until six o'clock in the morning. First Mr. Parks, and Mr. Kouch that were operating this engine on which they say there was no bell cord or brakes, because they were frozen; and then Mr. Zimmer comes with his man and operated it, from then until 11 o'clock, and Mr. Stewart and Mr. Kouch and Mr. Zimmer will testify to a condition of the bell and the brakes.

Against that is the testimony of Mr. Matthews, who was the fireman for Mr. Zimmer, whose testimony you will have to consider here. The evidence will show that Mr. Matthews, who was the

fireman for Mr. Zimmer on this engine at the time Mr. Huxoll was killed, when he left his engine, when it was truned back into the engine house that day, he reported the accident and he told how it happened, and what cause of it, and what the condition of the engine was, that he was working on. That statement was made on the first day of January, the day the accident happened, immediately after. On the next day that was extended into long hand, and signed by him, and he tells there about how fast the engine was running, and about the bell ringing, and about the engine being all right. That is important as it cill come into this case, and you watch it and you will see it come in. On the
127 23rd day of September, this law suit was brought in this court. About the first of September, 1911, Mr. Matthews was discharged from the service of the Union Pacific. Just kind of bear that in mind, these two dates, as this testimony comes in,—about the 1st of September 1911, Mr. Matthews was discharged, from The Union Pacific, and this law suit was brought on the 23rd day of September, 1911. Mr. Matthews testifies here now, and will, for the plaintiff, that the bell cord was broken, that there wasn't any bell; that the brakes were frozen and you could not use the brakes. You will have to get in connection with that.

Now the evidence will show that this steam situation down there, when you started to walk down the track, that you could see it. It was dense,—it was as thick as could be and as big as the side of a house. Mr. Huxoll walked into it, like you would walk into a cloud of smoke, and while he was in there between the tracks he got hurt. Now on the question about the ice,—the evidence will show that he got between the rails on that main track, two hundred feet before he could have reached that water crane. That he never got in there between those two rails because of ice two hundred feet away. That he wasn't within forth, possibly thirty or fourty feet of the water crane, when he was run over so it wasn't ice, and that to have gone out he could have stepped just across that track, upon another path, that is as wide as this jury box, between that main track and the next track south of it. That by going down between that track, he would have had to have gone around it, and across the track, upon which his engine stood, when all he would have had to do was to have crossed that track in the first instance.

That ice is all a pretence, first because there was not ice there for him to walk around, and second that he was walking around any ice, that is a pretense too. Here was his engine, (Indicating). There was the water crane, and there was the main track (Indicating).
128 They had him going out around this way (Indicating) to go around this way, to come across this track to go to his engine. When all he would have had to do was to come across here, walked up to his engine, and gone up into it. I want you to bear in mind and pay attention to the fact about that claim of ice, because you will find before you get through here that it was put there to give an excuse and nothing else, and it does not give one.

He was under that engine from thirty to forty minutes, and the engine was stopped with the drive wheels; and one of the drive wheels on his arm that lay across the rail, when they got that engine stopped. They could not move that engine; they didn't move it, and they went across to the round house and got jack screws and brought these over there and jacked that engine from the track, and lifted it straight up, to save that man if they could. They had to jack that engine up, they could not run it across there without going over his arm and cutting it off, and they thought it might be saved. I do not know whether or not we are being sued here because of that service, or because those men did that or not. They had to take off the brake rigging and unbolt it, and unfasten it. Now that is the case we are sued for being negligent, for causing this man's death. I say that our evidence will show Mr. Huxoll should not,—having regard for his own safety to have walked down that track——

Mr. Rose: The plaintiff objects to that as argument.

Mr. Strode: I apologize, that is argument.

5 o'clock P. M. October 14th, 1913. Court adjourned to meet at 9:30 A. M. the following morning, October 15th, 1913.

9:30 A. M., October 15th, 1913. Court met pursuant to adjournment, and the following proceedings were had and done.

129 Mr. Comstock: The plaintiff now offers in evidence, Exhibit "1", being a certified copy of the letters of administration in the estate of Fred J. Huxoll, deceased.

Mr. Strode: The defendant objects to the introduction of any testimony and moves the court to require the plaintiff to elect at this time upon which alleged acts of neglegence she seeks to recover, as against this defendant, and which particular alleged acts of neglegence she seeks to recover upon as the proximate cause of the injury. And moves that the plaintiff be required to elect as to whether she seeks to recover in this action as the alleged act of negligence, as the proximate cause, the claim that the round house was built too close to the tracks, or on the acts of negligence that there was ice about the water crane, or on account of the alleged act of negligence that there was steam and smoke on the track on the morning of this accident, or on the alleged act of negligence that the defendant company was using a road engine, instead of a switch engine, and that no flagman was on the engine to flag the engine through the smoke and steam or on the alleged act of negligence, that the defendant company was operating the engine at a high and dangerous rate of speed. The defendant asks that the plaintiff be required to elect and state at this time, which one of these various alleged acts of neglegence it now claims was the proximate cause of the injuries for which they seek to recover, so that the defendant may know which one,—at the opening of the trial,—the plaintiff is going to claim to be the act of negligence upon which they are going to seek to recover.

Overruled. Exception.

Mr. Strode: As far as this offer of Echibit One is concerned, the

record may show that the defendant admits for the purposes of this trial here, that an administrator was appointed of the estate of Fred J. Huxoll, and that Ella Huxoll was duly appointed the administrator of said estate in the county court of Lancaster County, Nebraska, as alleged in the plaintiff's petition, and qualified.

130 Mr. Rose: That is sufficient for our purposes.

Mr. Rose: The offer of Exhibit "1" is withdrawn.

ELLA HUXOLL, called as a witness on behalf of the plaintiff, was first duly sworn, and testified as follows upon examination.

By Mr. Rose:

Q. What is your name?
A. Ella Huxoll.
Q. Where do you reside?
A. North Platte, Nebraska.
Q. Are you the Ella Huxoll who is administratrix of the estate of Fred Huxoll, deceased?
A. I am.
Q. And as such administratrix you are the plaintiff, in this case?
A. Yes sir.
Q. What relation were you to the deceased, Fred Huxoll?
A. I was his wife.
Q. When did Mr. Huxoll die?
A. He died,—he was hurt on January 1st, and died the following morning, about two o'clock, Tuesday morning.
Q. What year was that?
A. 1911.
Q. Were you with him when he died?
A. No sir.
Q. Did you see his body afterwards?
A. I didn't see the body until it was brought home.
Q. Well, did you see it afterwards, when you,—when they got him home?
A. Yes sir.

131 Q. Upon what date was that?
A. That was about the 3rd of January.
Q. Did you meet his body?
A. Yes sir.

Mr. Strode: Now I object to this. We admit for the purposes of this trial, that Mr. Huxoll was killed. There is no question about it. And that he was run over by an engine at Sidney, and that he died on January 2nd, 1911, as a result of those injuries that he received at Sidney.

Mr. Rose: Very well.

Q. What was your husband's vocation before his death?
A. An engineer.
Q. What sort of an engineer?
A. Well, he was a freight engineer.

Q. Well, was he,—what I wa-t to get at is whether he was a locomotive engineer?

A. Yes sir.

Q. And where was he employed?

A. Well, he was running from North Platte to Sidney.

Q. By what company?

A. The Union Pacific.

Q. That is the defendant in this case?

A. Yes sir.

Q. Where were you married?

A. We were married at North Platte.

Q. Upon what date?

A. Upon October 19th, 1905.

Q. From that time until January, 1911, had you lived together as husband and wife?

A. Yes sir.

Q. Where had you lived during that period?

A. We lived at North Platte.

132 Q. What was your husband's business, at and before the date that you were married?

A. Well, for a while he had a little business of his own, a little confectionary store, and then after that for a while,—before he had his little store he worked in a grocery store, and then after that he worked in the shops a while, and from there he went to railroading.

Q. Well, what was his particular employment at the precise time you were married?

A. He was a fireman.

Q. A locomotive fireman?

A. Yes sir.

Q. In the employ of what company?

A. The Union Pacific.

Q. Now continuously from that date until the time of his death, what had been his employment and vocation?

A. He was an engineer.

Q. Do you remember how long he had had charge of an engine?

A. Do you mean both fircing and engineering.

Q. Yes sir?

A. About six years.

Q. And do you remember what date he was promoted from fireman to have charge of an engine, as an engineer?

A. I imagine it was in the fall of the year.

Q. Do you remember how many years he had been in charge of a locomotive engine before his death?

A. About three years.

Q. Now had he had any other employment except engine work from the time of your marriage until the time of his death?

A. No sir.

133 Q. Did you and Mr. Huxoll have any children?

A. Yes sir.

Q. What children did you have?

A. Two children, a little girl and a little boy.

Q. What is the name of the girl?
A. Marion Caroline Huxoll.
Q. What is the name of the boy?
A. Fredrick Andrew Huxoll.
Q. How old was Marion when he father died?
A. Three years old.
Q. How old was Fred at that time?
A. He was a year,—just a little over a year, a year and a few days.
Q. How old were you when your husband died?
A. I was 27.
Q. How old was your husband when he died?
A. 29.
Q. What was the condition of your husband's health from the time of your marriage until the time of his death?
A. He was in good health,—and a very healthy man.
Q. What was his strength, whether or not he was robust?
A. He was a robust man, and I should judge he weighed about 175 pounds.
Q. How tall a man was he?
A. Well, I could not say,—about a little over five feet I guess.
Q. Do you know just his height?
A. I do not know just exactly, no sir. He was as tall as I was.
Q. What kind of knowledge or information did you have during the period that you were his wife, what his monthly earnings were, in his employment?
A. (No answer.)

134 Q. Well, what means did you have,—did you acquaint yourself with that and if so, how. How did you come to know about that?
A. Well he brought me his check every month.
Q. Did you cash them every month?
A. Yes sir.
Q. Do you know approximately at this time what his earnings were every month,—during your married life?
A. Yes sir.
Q. What were they?
A. About 150 or 175 dollars, and close to 180 and some odd dollars.
Q. In what employment were his wages highest, that of fireman or engineer?
A. Engineer.
Q. Do you recall now approximately what he earned as a locomotive fireman every month.
A. 120 dollars, and 125, and sometimes more.
Q. And after he became engineer, and during the last three years of his life, what were his earnings from month to month?
A. Then is when he earned from $175 along there.
Q. Do you remember what the highest month's pay was that he ever got?
A. I think I do.

Q. Well, what was it?
A. About 180 dollars.
Q. In the period of upwards of five years, when you were his wife, was he laid off during any period of time?
A. No sir.
Q. Either by sickness or for discipline or anything?
A. Well no sir, he never was hurt in any wreck,—of course if he got sick he would probably lay off a day or so,—but that was very seldom.
Q. But I mean, was he ever disciplined for any mistakes of any kind, so that he was taken off his engine for any period?
135 A. No sir.
Q. During the time when you were Mr. Huxoll's wife, what was done with his earnings?
A. Why we paid our bills, what we had to pay every month,—and the rest, if we had any, left, we would put it in the bank.
Q. And who paid the bills?
A. Well if Mr. Huxoll was in off the road we paid them together and if not, I would do so.
Q. Who had control of the funds and of his earnings?
A. I did,—Mr. Huxoll always turned the money over to me.
Q. And who had control of the earnings that were put in the bank?
A. I did.
Q. Could you withdraw them on your own checks?
A. Yes sir.
Q. And did you do so?
A. Yes sir.
Q. And what employment did you make,—or what was done with the savings of his wages over and above your living expenses?
A. I do not quite understand?
Q. You mentioned that if there was anything left, after your expenses you put it in the bank. Now what did you use any money that you laid by and put it in the bank,—what did you use it for?
A. We would just save it and in case there was any sickness we would always have something to fall back on.
Q. Were you buying a home or anything of that kind?
A. Yes sir.
Q. How did you pay for the home?
A. We made monthly payments on it.
Q. Who earned the money to pay every month?
A. Mr. Huxoll.
Q. What sort of a home did he provide for you?
A. We had a little five room cottage.
136 Q. And was that all acquired after you became his wife?
A. Yes sir.
Q. Do you know how much of his earnings were put into that place?
A. Well,——
Q. Approximately, just give us, as near as you can recall about how much had you paid on the home at the time Mr. Huxoll died?

Mr. Strode: The defendant objects to that question as immaterial and incompetent.
Overruled. Exception.

A. About, I think we had paid about a thousand dollars.
Q. And that was to pay for the home in which you lived?

Mr. Strode: The defendant objects to that question as immaterial and incompetent.
Overruled. Exception.

A. Yes sir.
Q. Do you recall upon what date you last saw your husband alive, Mrs. Huxoll?
A. Yes sir.
Q. What was the date?
A. On a Wednesday morning.
Q. Do you remember what day of the month it was, and what year?
A. The year 1910.
Q. How long before New Year's day?

Mr. Strode: The defendant objects to that question as immaterial.
Mr. Strode: It is admitted that he left there on Wednesday before this accident in good health, and at the time he met with this accident was in good health and vogor, and capable of performing the services of a locomotive engineer.

Mr. Rose: That is all right.

137 Q. You may state whether the family relationship between you and your husband, was pleasing and affectionate or otherwise?

Mr. Strode: The defendant objects to that question as immaterial and in connection with that objection the defendant admits that the relations of this family were pleasing; that he was a good husband and a kind father, and anything else that they want to claim along that line, is admitted.
Mr. Rose: It is stipulated that Fred Huxoll at the time of his decease, left two children, Marion Caroline Huxoll, and Frederick Andrew Huxoll, dependent upon him, and that his widow and said children had theretofore derived their support from the earnings of said deceased.

Q. You were in North Platte at the time of the accident and know nothing personally about the accident or the incident of his injury?
A. Yes sir, I was in North Platte, at the time.

Cross-examination.

By Mr. Strode:

Q. About your husband's earnings of course you recall the fact

that his earnings increased some from the time he started when you were first married, up to the time he got to be the engineer?

A. Yes sir.

Q. After he got to be an engineer on this road, his earnings were more than they were when you first started together?

A. Yes sir.

Q. Now you didn't know or don't know definitely do you, or would you want to say definitely what your husband's earnings were, during the last year say?

A. Well,——

Q. Could you say definitely or would you want to look at the checks yourself to know?

138 A. You mean from month to month?

Q. Yes sir.

A. Well, I do not remember from month to month, but I just know what they were.

Q. Now taking the year 1910, that is the full year that Mr. Huxoll had worked before he was killed?

A. Yes sir.

Q. Now on that I want to show you a statement of his earnings and see if you think, after you look at it, that this is about right, or is right. Probably when you see the figures that you will recall them yourself,—just take the month of December, 1910, his earnings were $177.55. Now do you remember that figure?

A. Well, I can't remember exactly.

Q. Well, that is the nearest $180 that he ever earned wasn't in any one month, as far as you can remember?

A. That was his last,——

Q. You said, 180 dollars?

A. Well I said close to it.

Q. Well, that is close enough so that you could say $180. Now the next month, back of that, his earnings were $133.45 now do you recall that?

A. I do not remember that; I have had too much trouble, I can't remember it all.

Q. But you can see these figures. Now in October, do you remember that his earnings were $100.90?

A. No, I can't remember that.

Q. And taking the year, 1910, would you say that his earnings for that year were more than $142.03 a month?

A. What year?

Q. For the year,—the work year of 1910?

A. I think so.

139 Q. You think they were more than that?

A. Yes sir I think,—I think he earned more than that.

Q. It was always paid in checks?

A. Yes sir.

Q. And it was always by the Union Pacific?

A. Yes sir.

Q. You might look at the months if you want to; that is each month and you can see them yourself, what the earnings are. All

want is to have you look at it. We are not questioning them or questioning you about it, or your good faith, and statement of it. If you can refresh your recollection, and then say whether you think your husband's earnings for the year of 1910, exceeded $142.03 in that year, per month?

A. (No answer).

Q. Do you think it did after you look at the figures, that it exceeded the amount I have stated to you for the year 1910?

A. Of course I am stating as near as I can remember, I am not trying to tell any falsehoods.

Q. No I do not think that. The checks themselves will tell of course?

A. Yes sir.

Q. Now I have given you those figures, and I want you to tell the jury after looking at them, whether you think that your husband earned on an average for the year of 1910 more than $142.03 a month?

A. Well he did.

Q. Well, there are some months that he earned around $100 a month during the year 1910. Do you remember one month that that his check was just a little over $100 and some cents?

A. Well, I guess that probably was the time when he was sick.

Q. Well, you have to average that up, haven't you?

Mr. Rose: The plaintiff objects to that question as immaterial and incompetent.

(Question withdrawn.)

Q. Well what I am trying to get at is,—now you kept the pocket book, and saved the money, and put it in the bank, and paid the bills. Now after having shown you those figures, I want to know if you think that your husband actually earned in the year, 1910,—whether your husband actually earned more than $142.03 a month?

A. (No answer).

Q. You are not able to state are you,—you are not able to state whether it was over $142.03, on an average per month?

A. Most of his checks here run over $142.03 on an average per month?

Q. Can you read off any of those months, Mrs. Huxoll, and will you now, the account from that statement as to the amount that he received for that month. Can you recognize and remember that?

A. I can only remember the last month.

Q. And then when you stated it was $160, $175 or $180, you were just giving a kind of a general guess, at what the earnings were, weren't you?

A. Yes sir.

Q. But you would not say would you Mrs. Huxoll, that the figures I have shown you there, are not the correct and accurate figures of $142.03 a month on an average for the year 1910, taking the 12 months?

A. I do not understand the question.

Q. I say, taking the 12 months for the year 1910, you would not say that the $142.03 wasn't an average per month for that year,—you would not say that wasn't right, would you?
A. I do not know.

Witness excused.

141 Mr. Comstock: The plaintiff now offers to read in evidence the deposition of B. R. Fletcher.

Mr. Strode: Let the record show that so far as the claim on the part of the plaintiff that the train at Perdue with the engines or locomotives that Huxoll and Orton were to take to go down and bring into Sidney,—that it was a freight train upon which was freight destined for other states than the State of Nebraska, and that freight train had freight destined for points in the State of Nebraska. That the train at Perdue,—the freight train at Perdue was carrying Interstate Commerce.

Mr. Comstock: We might read another deposition right now, so that during the recess we can pick out parts from this deposition that we want to read.
Mr. Comstock: The plaintiff offers to read in evidence the deposition of W. A. Borton.
Mr. Strode: The defendant objects to the reading of this deposition, because I think that Mr. Borton is here in the court room.
The Court: If that is the case, let him come forward and be sworn, and we will take his testimony and not read the deposition.

W. A. BORTON, called as a witness on behalf of the plaintiff, was first duly sworn and testified as follows upon examination:

By Mr. Comstock:

Q. What is your name?
A. W. A. Borton.
Q. Where do you live?
A. Sidney, Nebraska.
Q. What is your occupation?
A. Train dispatcher.
Q. Are you in the employ of some railroad?
A. Yes sir.
142 Q. What company?
A. The Union Pacific.
Q. How long have you been in the employ of the Union Pacific?
A. A little over six years.
Q. And during what portion of that time have you been located at Sidney?
A. Five years.
Q. Were you in the employ of the Union Pacific Railroad at Sidney on the 1st day of January, 1911?
A. Yes sir.
Q. In what capacity were you serving that railroad at that time?
A. Yard master.

Q. And how long prior to that date had you been yard master?
A. Close to three years,—
Q. And how long after the first day of January did you continue as yard master?
A. Until a year ago last June.
Q. That would be in June, 1912?
A. Yes sir.
Q. And then you were made train dispatcher sinc-?
A. Yes sir.
Q. And have been train dispatcher since that time?
A. Yes sir.
Q. Are you familiar with the situation of the railroad yards of the Union Pacific Railroad Company, at Sidney, Nebraska, and were you familiar with the location and situation of these yards on the first day of January, 1911?
A. Yes sir.
Q. I would like to have you examine Exhibit 2, Mr. Borton, and I will ask you if that is a fair presentation of the situation of the yards and tracks of the Union Pacific railroad at Sidney
143 on the first day of January, 1911?
A. Yes sir.
Q. Now can you from this Exhibit 2, designate the situation of the station building at Sidney?
A. The depot and so forth?
Q. Yes sir?
A. Yes sir.
Q. Would you make some kind of an identification mark if there is none?
A. It is marked.
Q. Now Mr. Borton can you designate on this map, the wash house there?
A. Yes sir, right there is the wash house.
Q. Is it so marked on the map?
A. No sir.
Q. But it is the building that at that time was used as a wash house?
A. Yes sir.
Q. What characters on Exhibit 2, indicate the round house?
A. Well, this is the round house (Indicating).
Q. Is there any mark on Exhibit 2, to indicate any name?
A. Yes sir.
Q. Are there more than one round house?
A. There are two round houses.
Q. What if anything upon this map indicates the turn table?
A. The circle with the words turn table inside of it.
Q. Can you from this map, this Exhibit 2, indicate the location of the water crane in these yards?
A. The water crane does not seem to be marked,—the water crane is about where this letter X is.
Q. In what direction from the wash house is the water crane?
A. East.
Q. And in what direction from the wash house is the turn table?
A. East.

144 Q. In what direction from the wash house is the round house?

A. East and north.

Q. On the first day of January, 1911, was there any track in the Union Pacific railroad yards at Sidney, designated as the spot tr-ck?

A. Yes sir.

Q. Can you point out and designate that track upon Exhibit Two?

A. Yes sir.

Q. Is there any mark upon the Exhibit to identify it?

A. No, none, that I can see.

Q. Will you take a pencil and mark some character to designate which track is the spot track?

A. Yes sir.

Q. By what mark do you designate that?

A. The letters "XX".

Q. Does Exhibit 2, show which of the tracks shown upon Exhibit 2, is the main line track?

A. Yes sir, the main line track is marked,—you can tell by the blue print just where it is.

Q. Do the letters M. L. on Exhibit 2, designate the main line track of the Union Pacific Railroad Company?

A. Yes sir.

Q. Mr. Borton can you give the distance between the wash house and the main line track?

A. I would have to guess at it,—I think close to fifty feet.

Q. Do you know the scale upon which this map is drawn?

A. No sir.

Q. It shows for itself, doesn't it?

A. I think that part of it has been cut off,—no, 100 feet to the inch,—well then, it would be nearly 100 feet.

145 Q. And is that as you understand the scale,—is that the scale to which this map is drawn?

A. Yes sir.

Q. What, Mr. Borton, are the fine white lines extending from the turn table toward the roundhouses?

A. Tracks.

Q. Railroad tracks?

A. Yes sir.

Q. And for what purpose were they used?

A. For the purposes of putting engines into the house.

Q. What are the improvements if any indicated by the white lines extending north east and south east from the turn table?

A. These lines are tracks,—the cinder pit is on one of the tracks.

Q. Now on which track in reference to its being north or south and so forth, is the cinder pit upon?

A. It is on the north track of the three that extend east of the turn table.

Q. And are those tracks and were they on the first day of January 1911, used for the passage of trains and engines over them?

A. For the passage of engines, not trains.

Q. Now for what purpose was the middle track of the three extending east of the turn table,—for what was that track used?
A. The track past the coal chute was used for coaling engines and for an approach to the turn table.
Q. Will you please locate the coal chutes mentioned?
A. Yes sir, here they are.
Q. Now for what purposes was the track extending a little south easterly from the turn table used?
A. That was used as an approach to the spot track, and also connected with the coal track.
146 Q. It was used generally for handling engines from the turntable out to the spot track, or occasionally brought,—occasionally they were brought in that way and placed on the turn table on that track?
A. Yes sir.
Q. Coming in from the road?
A. Yes sir, occasionally. As a general think though it was used to run the engines off the turn table over that track on to what was termed the spot track.
Q. How many railroad tracks, Mr. Borton, were there in the Sidney yards of the Union Pacific Railroad Company, at Sidney, on the 1st day of January, 1911, north and south about opposite the water crane?
A. Seven tracks north.
Q. And how many south?
A. Six.
Q. How many tracks were there extending from the turn table into the round house?
A. 19.
Q. How many tracks other than those extending into the roundhouses, met the turn table?
A. You mean around here, on this side? (Indicating.)
Q. On all sides?
A. There were 5.
Q. Now many public highways were open and across the Sidney yards, on the part of the yards disclosed by Exhibit 2?
A. One.
Q. And what was the name of that?
A. I believe it is called Rose Street,—I am not certain,—Rose street, yes sir.
Q. And in what direction is that from the wash house?
147 A. West.
Q. Of the wash house?
A. Yes sir.
Q. And about what distance would that be from the turn table?
A. About six hundred feet.
Q. About what distance would that be from the water crane?
A. It would be between 900 and a thousand feet.
Q. Where is the water crane located in the Sidney Yards, and where was it located on the first day of January, 1911, with reference to the main line track of the Union Pacific railroad?

A. It was located east of the turn table, or,—east and north of the main track.

Q. How far north of the main track?

A. I measured that one time, and I do not remember the exact distance.

Q. Can you tell Mr. Borton, the distance from the turn table to the round houses?

A. I would think it was close to sixty feet but I am not certain. Those measurements were all made at one time, but I have forgotten what they were. I do not recall exactly what they are.

Q. What is the distance across the turn table?

A. I believe it was a 90 foot table, but I am not certain.

Q. The distance is a little greater from one round house, that the other?

A. Yes sir.

Q. Now, sixty feet, which does that refer to?

A. The closest one.

Q. What was the distance from the turn table to the round house on the first of January, 1911?

A. Well there was a slight difference between the two round houses, then, but the old round house that burned down, sat closer to the old turn table and did then, than the new one does.

148 Q. Well, is that the one that you testify was about sixty feet?

A. No, the old one that still stands is about sixty feet. But I would think that the house that burned down, was close to 80 feet from the turn table pit.

Q. Now, state the distance in feet from the turn table to the first track, south?

A. I believe that was 24 feet.

Mr. Comstock: It is stipulated by the parties to the suit, that it is 180 feet from the turn table to the cinder pit; 244 feet from the turn table to the water crane; 525 feet from the wash house to the water crane; sixty-two and a half feet from the wash house to the main line track; twenty-seven and seven-tenths feet from the turn table, south to the main line track; that the engines and tenders are seventy-five feet in length. That it is 180 feet from the character representing the engine on the spot track nearest the turn table, from the turn table. Two hundred and forty-four feet from the pilot of the engine furthest east of the spot track, as designated by the map, to the water crane. And from a point directly south of the turn table to the water crane, two hundred and seventy-five feet. That the wooden arm used to turn the turn table, extends twelve feet outside of the turn table pit.

Q. Now, Mr. Borton, is there any platform on the ground about the water crane?

A. Yes sir.

Q. Just describe to the jury this water crane?

A. It is a wooden platform around the crane,—I think is was about

8 feet wide, and about 12 feet long. I am not positive in which direction,——

Q. It is a little longer east and west?

A. It is about 12 feet east and west, and,——

Q. How far north and south?

A. About 8 feet.

149 Q. Now just describe the crane itself, and the purposes for which it is used?

A. The crane itself is an upright iron pipe from twelve to fifteen inches in diameter, and what they call a goose neck attached to the top of it, with a crook on the end and you can turn it around, and it is used for watering the engines.

Q. On both tracks?

A. Yes sir.

Q. What tracks?

A. The main track and spot track.

Q. And one is on the north, and the other is on the south side of it?

A. Yes sir.

Q. And which is on the south?

A. The main track.

Q. And the spot track on the north?

A. Yes sir.

Q. Now are all the engines that are watered at Sidney, do they take water at this crane?

A. No, not all of them.

Q. Most of them?

A. Well, I would not say the most of them,—I presume the biggest part of the out going engines would go east of the water crane.

Q. And what engines on the spot track were watered there?

A. Yes sir.

Q. And all the engines on the spot track that are watered there, stand on the north side of the water crane?

A. Yes sir.

Q. Now is there any *drane*, or anything about this water crane?

A. I think it is connected with the sewer.

Q. Now describe the drain to the jury, what it is for, and the purposes of it?

A. A sort of a catch basin at the bottom of it, with a screen that lets the water go down into a sort of a pit.

150 Q. How does the water get down to this platform there?

A. There is a slight leakage after an engine is watered. And the crane is raised up and there is always a slight leakage which runs back.

Q. And the water runs down and where does that run when it comes down?

A. Well it runs down below the pit, on the upper, on the upper part draining this platform,—I think there is a sewer leads off from that.

Q. And does the water run down on this platform?

A. Well, what water there is.

Q. Do you remember, Mr. Borton, the condition of the weather, and the temperature on the first day of January, 1911?

A. It was extremely cold, with a strong north west wind, and snowing.

Q. Do you know how cold, in degrees?

A. 18 below zero, I believe.

Q. And to what extent was it snowing?

A. Well, at times it snowed very hard, and it was more in the shape of flurries than anything else. It would *sh*ow very hard for a while, and then it would let up. And for a few minutes, possibly there would not be any snow at all.

Q. Do you remember what the condition of the yards at Sidney was on the date mentioned, with reference to smoke and steam?

A. Well, about opposite the round house, and east and west of there, there was a great deal of smoke and steam blowing across the tracks.

Q. And from what point was this steam coming,—the steam and smoke?

A. It was coming from the round house, and engines that stood in different parts of the yard. The coal chute, and the cinder pit.

Q. And the spot track?

A. Yes sir.

Q. Now was there snow upon the ground?

A. Yes sir.

151 Q. Do you remember the conditions about the water crane in reference to there being ice or otherwise?

A. There was very little ice there?

Q. When did you examine that, Mr. Borton?

A. Well, I was by there several times during the day, and in the morning.

Q. In the morning?

A. In the forenoon.

Q. And do you know about the hour that Huxoll was injured?

A. I believe it was about 11 o'clock.

Q. And did you examine the conditions just prior to that around the water crane?

A. I can't say just exactly how long it was, but I was by the water crane several times during the day, and I didn't notice much ice there during the forenoon.

Q. There was some ice there?

A. Yes sir.

Q. Now in what direction from the water crane did this *ice* extend?

A. Well, it was just little splashes down between the platform and the track, clear around the water crane.

Q. Clear around the water crane?

A. Yes sir.

Q. And what was the conditions gernerally in reference to ice around this water crane, in extremely cold weather, when it was 18 degrees below zero.

A. There would be a little ice, but it was never allowed to accumulate,—there was never any great amount of ice.

Q. Well, how did you prevent its accumulation?

A. Well, the yard section gang looked after that, and if there was a great amount of it there, it was taken care of.

Q. It was chopped out?

A. I presume they chopped it out.

152 Q. And moved it away?

A. There was never very much there, the place was kept as cleane as possible.

Q. Now you gave a deposition, didn't you, in this case on the 28th day of June, 1912?

A. Yes sir.

Q. Now just to refresh your recollection, in that deposition, wasn't this question asked of you. "In what direction from the water crane did that ice extend?" and to that question did you not answer, "All around"?

The Court: He has answered that, as I understand it.

Mr. Strode: Yes sir, he has answered that.

Mr. Comstock: I did not understand that the witness answered that way, if he did, that is all I want.

Q. Now, Mr. Borton, what is the situation of these yards, in reference to there being a very high hill or otherwise near them?

A. There is a sort of hill or bluff north of the round house.

Q. And how high is this bluff?

A. 150 feet or 200 feet possibly.

Q. Rises right up abruptly?

A. No, there is a slope.

Q. Steep or otherwise?

A. A rather steep slope.

Q. It rises three hundred feet you would say?

A. Well it is rather hard to tell, I would think it was two hundred feet but I can't say,—I am not much of a judge of height.

Q. Now as yard master, of the Union Pacific Railroad, on January, 1st, 1911, do you know whether there was a board of examiners to make rules and regulations for the governing of the operation of engines?

A. There was a board examined as to the interpretation of the rules, not for the making of the rules.

Q. And for the instruction of employees?

153 A. Yes sir.

Q. And did they visit the Sidney yards, occasionally,—this board?

A. Yes sir, at certain times.

Q. And gave instructions there?

A. They gave an examintaion,—their visit was in the nature of an examination,—all the employees of the transportation department were examined on the rules and instructed in the rules that they didn't understand.

Q. And was there an examination of those in the operating department also?

A. Yes sir.

Q. And instructions generally given in the operation of trains and engines?

A. Yes sir.

Q. An oral instruction,—oral examination?

A. Yes sir, it was oral examination.

Q. And oral instructions?

A. Yes sir.

Q. Now can you tell the jury, Mr. Borton, to what extent this steam and smoke, about the time Mr. Huxoll was injured, obstructed the view there in the Sidney yards?

A. Well, the steam was very dense at the point,—the steam and smoke, you could not see anything at all.

Q. At or near the water crane?

A. Yes sir, I would say for a distance of three or four hundred feet up and down the track, it was particularly dense. And at times you could see and then again it would be so that you could not see at *at* all.

Q. Now there were general rules and instructions weren't there, Mr. Borton?

A. On the first day of January?

154 Q. Yes sir. There were general rules and instructions, weren't there on the 1st day of January, 1911, in regard to moving engines in the yards in stormy and foggy weather?

A. Yes sir there were instructions.

Q. And in occasions where the view was obstructed by smoke and steam?

A. No, nothing t- that effect.

Q. What were the rules and instructions to control the movement of engines in the Sidney yards in foggy and smoky weather?

Mr. Strode: The defendant objects to that question as incompetent, no proper or sufficient foundation laid, and if there were rules, the rules themselves would be the rest evidence of what they were.

Overruled. Exception.

Mr. Strode: And for the further reason, if I may add to that objection, it is not shown that the question is confined to the oral instruction, or whether it means that the witness should testify in regard to written rules, and that the question in order to be competent, would have to indicate, whether the witness is called upon to testify to written rules or oral instructions.

The Court: The objection going to the question as to whether or not the rules that the witness is now asked to testify to, were oral or written, I will sustain the objection. Exception.

Q. On the first day of January, 1911, you were the yard master at the Sidney yards.

A. Yes sir.

Q. And had control of the movements of engines and trains in the yards?

A. Yes sir.
Q. They were controlled and operated under your directions and instructions?
A. Yes sir.
155 Q. Now what were your instructions in the operation of engines in stormy and foggy weather in the yards at Sidney generally, when the clear view was obstructed?

Mr. Strode: The defendant objects to that question as incompetent, no proper or sufficient foundation laid, and not the best evidence.
Overruled. Exception.

A. In the operation of the yard,—the yard crews are always allowed certain latitude and they are presumed to move cautiously whenever it is necessary, and in case of storms the engines are operated carefully.
Q. Slowly?
A. Yes sir, they go,—if they know that everything is clear they of course go faster, and if they know that the tracks are not clear, it is necessary to feel your way along, and at other times you move faster and it is a matter that is rather left to the man on the ground, and the man in charge of the engine.
Q. Were they ever required to be run under control?

Mr. Strode: The defendant objects to that question as leading, and calling for the conclusion of the witness, and incompetent.
Overruled. Exception.

A. As I understand it, under control has no specific meaning, and under control as defined in the book of rules has no special meaning, and it is not confined to the yard, but it is more of a train rule.
Q. I am asking you as yard master, of the yards at Sidney, Nebraska, whether or not engines in the yards there, were at that time, in stormy and foggy weather, required to be run under control?

Mr. Strode: The defendant objects to that question as incompetent, and no proper or sufficient foundation laid, and an attempt to cross examine his own witness with the testimony of his own witness before him. He has taken the testimony of this witness
156 twice, and he will not be permitted to cross examine his own witness on the ground that he has reason to expect the witness will give a certain answer, when he has the answer of this witness before him.
Overuled. Exception.

A. I do not understand exactly; if he wants me to apply the definition as given for "under contril" in the book of rules, I would say no.
Q. That they weren't so required to run?
A. According to the interpretation of under control, as given in the book of rules, they are not required to do so.
Q. Well, were the instructions affecting the speed in stormy and foggy weather, changed?

A. As I said before, in stormy weather, there was a certain latitude allowed the men, in stormy weather. They were presumed to use their own judgment, were presumed to be competent, to use their own judgment, and when it was necessary to run cautiously, they were presumed to do so.

Q. But were there instructions with reference to the *the* movement of engines or trains in foggy and stormy weather?

A. I presume that there were general instructions that in foggy and stormy weather, the men in charge of the engines were to move cautiously. That was understood,—that is a matter.——

Q. Was it a general custom and practice, and understood to be?

A. Yes sir.

Q. Now, Mr. Borton, in this same deposition to which attention has been heretofore called, wasn't this question put to you,—"Were there any instructions affecting the speed in stormy or foggy weather?" and to which question, didn't you answer, "Yes, sir, there were instructions"?

A. Didn't I answer the same thing here. I said I presume there were instructions.

157 Q. I didn't understand you if you so answered. That is all, that is sufficient. Is that your answer now, that there were?

Mr. Strode: He answered that once.

A. Yes sir. I answered that four or five times.

Q. Now what were those instructions?

Mr. Strode: The defandant objects to that question as already asked and answered, and incompetent, and not the best evidence, and no sufficient foundation laid, and it is a repetition; this witness has been asked that same matter heretofore.

Overruled. Exception.

A. The instructions were, in case of extraordinary weather, the engines should be handled carefully, and to move cautiously when necessary, and there were instructions,—I do not know exactly the nature of the instructions, it is simply a matter that is understood.

Q. Now, Mr. Borton, from your experience as a railroad man and a yard master, of the Sidney yards on the day of this accident, do you consider it necessary to have general rules, and regulations for the operation of engines, in those yards in foggy and stormy weather, or when the track was obscured from view?

Mr. Strode: The defendant objects to that question as incompetent, and no issue tendered in this case on any such matter, and no claim made that there was a rule, or a failure to have a rule on this subject, and no proper and sufficient foundation laid for the question; calling for the naked conclusion of this witness, and incompetent. There is no issue tendered of any such thing. There is no issue here of a failure to make rules. There is no charge of negligence, and our failure to make reasonable rules, but I think that Judge Comstock just now discovered that that is one thing that they didn't charge us with.

(Question withdrawn).

158 Q. I will ask you if such rules and reglations weren't generally observed and considered necessary as general principles of railorading?

Mr. Strode: The defendant objects to that question as incompetent, and indefnite as to what rules are referred to, and particularly as to what other railroads may do, and as not within any issue, and as incompetent.

Overruled. Exception.

Q. Rules controlling the operation of engines in the Sidney yards in foggy and stormy weather when the view of the track was obscured?

Mr. Strode: The defendant objects to that question as indefinite, as to what rules are referred to, and particularly as to what other railroads may do, and as not within any issue, and incompetent.

Overruled. Exception.

A. I have answered that several times, and I have told you that in stormy weather the engines were supposed to move cautiously and in case of foggy and smoky weather, that they were supposed to move through, they would slow up and move carefully and cautiously.

Q. And that was in compliance with the general rules of railroading?

Mr. Strode: The defendant objects to that question as indefinite as to what rules are referred to, and particularly as to what other railroads may do, and as not within any issue, and incompetent. It is certainly sufficient to confine the issue or inquiry to the Sidney yards.

Sustained. Exception.

Q. How long,—Mr. Borton, how long have you been in the railroading business?

A. About 22 years.

Q. As a yard man, a good deal of that time?

A. Possibly ten years of that time.

Q. And for what railroads have you worked?

A. The Burlington; Grand Trunk; the Union Pacific; and
159 Santa Fe. I worked for a very short time for the Chicago & Northwestern.

Q. And your acquaintance with the general principles of railroading, and operation of trains and engines in yards, is extensive, isn't it?

A. In the yards I worked in, I was acquainted with it. But special yard rules,—there are always special instructions in one yard, that would not necessarly apply to another.

Q. What I want to ask you particularly about Mr. Borton, is if the necessity of certain rules in the operation of engines, is not universal?

Mr. Strode: The defendant objects to that question as calling for

the conclusion of the witness, and no proper and sufficient foundation laid, and incompeten- and not within any issue in this case.

Overruled. Exception.

A. I believe that those rules are made by what is known as the American Railway Association, of which nearly all railroads are members.

Q. And similar precautions obtain in most of the yards in the operations of engines when the tracks are obscured?

Mr. Strode: The defendant objects to that question as immaterial and incompetent, and no proper or sufficient foundation laid, and leading.

Overruled. Exception.

A. I could not say as to what the specific instructions are on all roads, I presume there are such instructions.

Q. Now I want to ask you Mr. Borton, what was the custom in the Sidney yards, of operating engines, there in stormy and foggy weather when the track was obscured?

A. The men were told to move cautiously, I remember distinctly of telling the yard crew. The biggest part of the time I on the yard engine myself,—and I told them to move carefully through that bank of steam and smoke and not get into anything.

160 Q. Now was there a custom at the time Mr. Huxoll was killed in the Sidney yards, of operating engines,—of keeping them under control?

Mr. Strode: The defendant objects to that question as incompetent and no proper of sufficient foundation laid.

Overruled. Exception.

A. The engineers were told to move cautiously. But I d- not know that I ever told a switch engine to go through a bank of fog, under control.

Q. But I want to ask you, Mr. Borton, if it wasn't the custom and practice in the Sidney yards, at the time Mr. Huxoll met his death, to operate engines in the yards under control?

Mr. Strode: The defendant objects to that question as incompetent, and no proper and sufficient foundation laid, and the witness already answered not as the term under control is used in the book of rules.

Overruled. Exception.

A. Not as the term "und-r Control" is used in the book of rules it is not necessary, because it does not apply to yards.

Q. What is the definition of under control as you understand it?

A. To be prepared to stop within the distance in which the track is seen or known to be clear, and the definition is made for the,—it is simply a train definition, and the intention of the definition is,——

Q. Well, that rule applies to all trains approaching the yards, Doesn't it?

A. Yes, sir.

Q. Now as I understand you, the term used in railroading, "Un-

der Control" in the operation of trains, and engines, means that the train and engine should be run so that it can be stopped within the distance that the track can actually be seen or known to be clear?

161 A. Yes, sir.

Q. Now calling your attention just to refresh your recollection to this same deposition, that I have heretofore called your attention to, I will ask you if this question wasn't put to you. "Now, there was also a custom of keeping the engine under control, under what is called, control, at all times?" and to that question, did you not answer, "Yes, sir"?

A. I do not remember, that deposition was taken quite a while ago.

Mr. Strode: Wait, I want to object to that, as an attempt to impeach their own witness. Now I want to get the record on this. This witness was examined in this court before, and his deposition *and his deposition* was taken and they read to him certain questions, when he was a witness here, from that deposition, and asked him if he didn't say or give certain answers, in his deposition, to certain questions, among which was this question, that he is now again reading to this witness. He has before him the answer of this witness so that he can't put that question to this witness as an impeaching question. When he is advised by the witness himself on the witness stand, when he was examined here before what he would answer, or what his answer was, when he gave it to that question, and he has that answer before him, he then can't ask the question, and when he gets the answer, he can't seek to impeach him because he is advised of the answer. You can only impeach your own witness where you have been mis-led by his answer, to the question. Where you have a right to expect a different answer, and he does not give that answer that you expect, then you may plead surprise to the court and ask permission to impeach on that matter but when you have in your own hand his statement as to what his answer is, that eliminates the question of whether you can impeach.

It now being 12 o'clock Noon October 15th, 1913, court adjourned until 2 o'clock the same day.

162 Two O'Clock P. M. October 15th, 1913, court met pursuant to adjournment, and the following proceedings were had and done.

W. A. BORTON, recalled as a witness testified as follows upon examination by Mr. Comstock:

Q. (Last question read as follows:) Now calling your attention just to refresh your recollection, to this same deposition that I have heretofore called your attention to, I will ask you if this question wasn't put to you. "Now, there was also a custom of keeping the engine under control, what is called control, at all times?" and to that question didn't you answer, "Yes, sir?"

Mr. Strode: Add to the objection. And for the further reason that the witness now being examined, testified as a witness for the

plaintiff on the further hearing,—upon the former hearing, and that in relation to the subject inquired about, the following question was asked this witness by counsel for the plaintiff, "Wasn't it the custom and practice, at, and for sometime prior to the death of Huxoll, in the operation of switch engines in the Sidney yards, to have the engine under such control that it could be stopped within the distance in which the track was or could be seen to be clear?" and the following answer by this witness to that question was made "There seems to be a misunderstanding, in reference to "under control", and I would like to explain it to the counsel. The definition of under control contained in the book of rules, does not apply to yard engines, and there is no place in there where you can find the word "yard engine" mentioned in connection with "Under control." There are two items that refer particularly in the book of rules to yards and yard engines. One of them defines the yard, and the other defines the yard engine. There is nothing said in connection with a definition as to what the word control means, with reference to "switch engines," and the further question by counsel for plaintiff,

"Now with that explanation, please answer the question as
163 put?" and the answer, "Yes sir." And the following question "Now, Mr. Borton isn't that the custom and practice in general railroading?" Answer: "They are operated, prepared to stop." (Question re-read.) Answer, "Yes sir." And on cross-examination, the following question by counsel for the defendant, "Yesterday, in your direct examination, Mr. Comstock put to you this question, 'Wasn't it the custom and practice at, and for some time prior to the death of Huxoll, in the operation of switch engines in the Sidney yards, to have the engine under such control so that it can be stopped within the distance in which the tracks were seen to be clear?' Now right there I want to ask you if there was any custom or practice in the Sidney yards to so operate an engine because of the possibility of pedestrians being on the track?

A. No sir.

Question: That referred to either cars and engines? Yes sir.

Q. And your answer referred to that and not to pedestrians?

A. Yes sir.

Q. And where,—was there a rule of the Union Pacific in force at that time requiring the employees to look out for themselves and not depend upon others to look out for them?

A. Yes sir.

Q. Now then in answer to that question of Mr. Comstock's do you remember rising in your place there and talking about a misunderstanding as to "Under control," and after you had just made that explanation that Mr. Comstock jollied you, and he put the question back to you and you answered 'yes sir,' do you mean now to say that there was any custom or practice in the Sidney Yards, to operate a switch engine, so that it could be stopped in the distance that the track could be seen to be clear?

A. No sir, Mr. Comstock put his question to me in such a way that I could not answer that intelligently and the way I wanted to."

Now, I call attention at this time, to that direct testimony of this witness, who testified as a witness for the plaintiff upon the former trial, and object to this question as incompetent, and im-
64 proper for the reason that the counsel, will not be permitted now to ask a question, and seek to elicit an answer that is the same as the answer given by the witness when he testified before in this trial, and then seek to impeach that by deposition taken sometime prior to that.

Mr. Rose: In behalf of the plaintiff, we stand ready, if counsel is so willing, to stipulate, that the witness delivered the testimony which he read into the record here at the former trial in May, 1913, if counsel is also willing to concede the authenticity of the testimony.

Mr. Strode: The defendant, will concede that for the purposes of this court passing upon the objection.

Mr. Rose: Let the record show also that the objection was stated openly, in the presence of the jury, with counsel facing the jury, and that the jury has heard it all, which is the fact.

The Court: Taking into consideration the objection presented on the part of the defendant, and the offer made on the part of the plaintiff, the objection is overruled. Exception.

Q. (Last question read as follows:) Now calling your attention just to refresh your recollection, to this same deposition that I have heretofore called your attention, to, I will ask you if this question wasn't put to you. "Now, there was also a custom of keeping the engine under control, what is called control, "Yes sir."?

Mr. Strode: Wait, I want to object to that, as an attempt to impeach their own witness. Now I want to get the record on this. This witness was examined in this court before, and his deposition was taken and they read to him certain questions, when he was a witness here, from that deposition, and asked him if he didn't say or give certain answers, in his deposition to certain questions, among which was this question that he is now again reading to this witness. He has before him the answer of this witness, so that
65 he can't put that question to this witness as an impeaching question. When he is advised by the witness himself on the witness stand, when he was examined here before what he would answer, or what his answer was, when he gave it to that question, and he has that answer before him, he then can't ask the question, and when he gets the answer, he can't seek to impeach him because he is advised of the answer. You can only impeach your own witness where you have been mis-lead by his answer, to the question. Where you have a right to expect a different answer, and he does not give that answer that you expect, then you may plead surprise to the court and ask permission to impeach on that matter, but when you have in your hand his statement as to what his answer is, that eliminates the question of whether you can impeach.

And for the further reason that the witness now being examined, testified as a witness for the plaintiff on the former hearing, and

that in relation to the subject inquired about, the following question was a-ked this witness by counsel for the plaintiff:

Q. Wasn't it the custom and practice, at, and for sometime prior to the death of Huxoll, in the operation of switch engines in the Sidney yards, to have the engine under such control that it could be stopped within the distance in which the track was or could be seen to be clear and the following answer by this witness t- that question was made? A. There seems to be a misunderstanding, in reference to "under control," and I would like to explain it to the counsel. The definition of under control contained in the book of rules, does not apply to yard engines, and there is no place in there where you can find the word "yard engine" mentioned in connection with "Under control." There are two items that refer particularly in the book of rules to yards and yard engine. One of them defines the yard, and the other defines the yard engine. There is nothing said in connection with a definition as to what the word control means, with reference to switch engines" and the further question by counsel for the plaintiff, Q. "Now with that explanation, please answer the question as put?" and the answer, "Yes sir." And the following question: "Now Mr. Borton isn't that the custom and practice in general rail-roading?" A. "They are operated, prepared to stop." (Question re-read.) Answer, "Yes sir."' And on cross examination, the following question by counsel for the defendant, Q. "Yesterday, in your direct examination, Mr. Comstock put to you this question, 'Wasn't it the custom and practice at, and for some time prior to the death of Huxoll, in the operation of switch engines in the Sidney yards, to have the engine under such control so that it can be stopped within the distance in which the tracks were seen to be clear?' Now right there I want to ask you if there was any custom or practice in the Sidney yards to so operate an engine because of the possibility of pedestrians being on the track?" A. "No sir." Q. "That referred to either cars and engines"? A. "Yes sir." Q. "And your answer referred to that, and not to pedestrians?" A. "Yes sir." Q. And where,—was there a rule of the Union Pacific in force at that time requiring the employees to look out for themselves and not depend on others to look out for them?" A. "Yes sir." Q. Now then in answer to that question, of Mr. Comstock's do you remember rising in your place there and talking about a misunderstanding as to "Under control" and after you had just made that explanation that Mr. Comstock jollied you, and he put the question back to you and you answered 'Yes sir,' do you mean now to say that there was any custom or practice in the Sidney yards, to operate a switch engine, so that it could be stopped in the distance that the track could be seen to be clear?" A. No sir, Mr. Comstock put his question to me in such a way that I could not answer that intelligently and the way I wanted to."

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Now, I call attention at this time, to that direct testimony of this witness, who testified as a witness for the plaintiff upon the

former trial, and object to this question as incompetent, and
167 improper for the reason that the counsel, will not be permitted to now ask a question, and seek to illicit as answer that is the same as the answer given by the witness when he testified beforo in this trial, and then seek to impeach that by deposition taken sometime prior to that.

Overruled. Exception.

A. I do not believe it was. I read the deposition over once or twice and I find answers in here to my questions that I know I didn't give. I didn't give them the way they are in the deposition.

Q. Do you remember, Mr. Borton, the incident of the taking of the testimony of yours?

Mr. Strode: The defendant objects to that question as an attempt to cross examine his own witness and incompetent.

Overruled. Exception.

A. Yes sir.

Q. Of this deposition you hold in your hand?

Mr. Strode: The defendant objects to that question as an attempt to cross examine his own witness and incompetent.

Overruled. Exception.

A. I remember the deposition being taken.

Q. Do you remember who examined you at that time?

Mr. Strode: The defendant objects to that question as an attempt to cross examine his own witness, and incompetent.

Overruled. Exception.

A. Yes sir, Mr. Hoagland.

Q. And who examined you for the company?

Mr. Strode: The defendant objects to that question as an at-empt to cross examine his own witness, and incompetent.

Overruled. Exception.

A. I believe it was Mr. Shehan.

Q. And where was it taken?

168 Mr. Strode: The defendant objects to the question as an attempt to cross examine his own witness, and incompetent.

Overruled. Exception.

A. Sidney.

Q. Do you remember about the date upon which it was taken?

Mr. Strode: The defendant objects to that question as an attempt to cross examine his own witness, and incompetent.

Overruled. Exception.

A. No sir.

Q. Well, it was taken shortly after this accident happened?

Mr. Strode: The defendant objects to that question as an attempt to cross examine his own witness, and incompetent.

Overruled. Exception.

A. Taken several months after.

Q. Now what is your answer to the last question, can you by refreshing your recollection, state whether or not these questions were asked and answers made?

Mr. Strode: Wait, I want to object to that, as an attempt to impeach their own witness. Now I want to get the record on that. This witness was examined in this court before, and his deposition was taken and they read to him certain questions, when he was a witness here, from that deposition, and asked him if he didn't say or give certain answers in his deposition to certain questions, among which was this question that he is now again reading to this witness. He has before him the answer of this witness, so that he can't put that question to this witness as an impeaching question. When he is advised by the witness himself on the witness stand, when he was examined here before what he would answer, or what his answer was, when he gave it to that question, and he has that answer before him, he can't then ask the question and when he gets the answer, he can't seek to impeach him because he is
169 advised of the answer. You can only impeach your own witness where you have been mis-lead by his answer to the question. Where you have a right to expect a different answer, and he does not give that answer that you expect, then you may plead surprise to the court and ask permission to impeach on that matter, but when you have in your hand his statement as to what his answer is, that eliminates the question of whether you can impeach.

And for the further reason that the witness now being examined, testified as a witness for the plaintiff on the former hearing, and that in relation to the subject inquired about, the following question was asked this witness by counsel for the plaintiff:

Q. Wasn't it the custom and practice, at, and for sometime prior to the death of Huxoll, in the operation of switch engines in the Sidney yards, to have the engine under such control that it could be stopped within the distance in which the track was or could be seen to be clear?" and the following answer to that question by this witness was made, A. "There seems to be a misunderstanding, in reference to "under control", and I would like to explain it to the counsel. The definition of under control contained in the book of rules, does not apply to yard engines, and there is no place in there where you can find the word "yard engine" mentioned in connection with "Under control". There are two items that refer particularly in the book of rules to yards and yard engines: One of them defines the yard and the other defines the yard engine. There is nothing said in connection with a definition as to what the word control means, with reference to switch engines," and the further question by counsel for plaintiff, Q. "Now with that explanation, please answer the question as put?" and the answer, "Yes sir". And the following question: Now Mr. Borton, isn't that the custom and practice in general railroading?" A. "They are operated prepared to stop." (Question re-read) Answer, "Yes sir". And on cross examination, the following question by counsel for the defendant,

Q. "Yesterday, in your direct examination, Mr. Cumstock
170 put to you this question, 'Wasn't it the custom and practice at, and for sometime prior to the death of Huxoll, in the operation of switch engines in the Sidney yards, to have the engine under such control so that it can be stopped within the distance in which the tracks were seen to be clear?" Now right there I want to ask you if there was any custom or practice in the Sidney yards to so operate an engine because of the possibility of pedestrians being on the track?" A. "No sir". Q. "That referred to either cars and engines?" A. "Yes sir". Q. "And your answer referred to that, and not to pedestrians?" A. "Yes sir." Q. "And where,—was there a rule of the Union Pacific in force at that time requiring the employees to look out for themselves and not depend on others to look out for them?" A. Yes sir". Q. Now then in an answer to that question, of Mr. Comstock's do you remember rising in your place there and talking about a misunderstanding as to "Under control" and after you had just made that explanation, that Mr. Comstock jollied you, and he put the question back to you and you answered, "Yes, sir", do you mean now to say that there was any custom or practice in the Sidney Yards, to operate a switch engine, so that it could be stopped in the distance that the track could be seen to be clear?" A. "No sir, Mr. Comstock put his question to me in such a way that I could not answer that intelligently and the way I wanted to."

Now I call attention to this at this time to that direct testimony of this witness, who testified as a witness for the plaintiff upon the former trial, and object to this question as incompetent, and improper for the reason that the counsel, will not be permitted to now ask a question, and seek to *illecit* an answer that is the same as the answer given by the witness when he testified before in this trial, and then seek to impeach that by deposition taken some time prior to that.

Overruled. Exception.

A. No sir, I do not believe I could.
Q. You could not refresh your recollection and state?

171 Mr. Strode: Wait, I want to object to that, as an attempt to impeach their own witness. Now I want to get the record on that. This witness was examined in this court before, and his deposition was taken and they read to him certain questions, when he was a witness here, from that deposition, and asked him if he didn't say or give certain answers in his deposition to certain questions, among which was this question that he is now again reading to this witness He has before him the answer of this witness, so that he can't put that question to this witness as an impeaching question. When he is advised by the witness himself on the witness stand what his answer would be, when he was examined here before, or what his answer was, when he gave it to that question, and he has that answer before him, he can't then ask the question and when he gets the answer, he can't seek to impeach him because he is advised of

the answer. You can only impeach your own witness where you have been mislead by his answer to the question. Where you have a right to expect a different answer, and he does not give that answer that you expect, then you may plead surprise to the court, and ask permission to impeach on that matter, but when you have in your hand his statement as to what his answer is, that eliminates the question of whether you can impeach.

And for the further reason that the witness now being examined, testified as a witness for the plaintiff on the former hearing, and that in relation to the subject inquired about, the following question was asked this witness by counsel for the plaintiff:

Q. "Wasn't it the custom and practice, at, and for sometime prior to the death of Huxoll, in the operation of switch engines in the Sidney yards, to have the engine under such control that it could be stopped within the distance in which the track was or could be seen to be clear?" and the following answer to that question by this witness was made: A. "There seems to be a misunderstanding, in reference to "under control," and I would like to explain it to the
172 counsel, The definition of under control contained in the book of rules, does not apply to yard engines, and there is no place in there where you can find the word "yard engine" mentioned in connection with "Under control". There are two items that refer particularly in the book of rules to yards and yard engines: One of them defines the yard and the other defines the yard engine. There is nothing said in connection with a definition as to what the word control means, with rererence to switch engines, "and the further question by counsel for plaintiff. Q. "Now with that explanation, please answer the question as put?" and the answer, "Yes sir". And the following question: Now Mr. Borton, isn't that the custom and practice in general railroading?" A. "They are operated prepared to stop." (Question re-read) Answer, "Yes sir. And on cross examination, the following question by counsel for the defendant, Q. "Yesterday, in your direct examination, by Mr. Comstock — put to you this question, 'Wasn't it the custom and practice at, and for sometime prior to the death of Huxoll, in the operation of switch engines in the Sidney yards, to have the engine under such control so that it can be stopped within the distance in which the tracks were seen to be clear?" Now right there I want to ask you if there was any custom or practice in the Sidney yards to so operate an engine because of the possibility of pedestrians being on the track?" A. "No sir". Q. "That referred to either cars and engines?" A. "Yes sir". Q. "And your answer referred to that, and not to pedestrians?" A. "Yes sir." Q. "And where,—was there a rule of the Union Paicfic in force at that time requiring the employees to look out for themselves and not depend on others to look out for them?" A. "Yes sir". Q. "Now then in answer to that question, of Mr. Comstock's do you remember rising in your place there and talking about
173 a misunderstanding as to "Under Control" and after you had just made that explanation, that Mr. Comstock jollied you, and he put the question back to you and you answered, "Yes sir", do you mean now to say that there was any custom or practice in the

Sidney Yards, to operate a switch engine, so that it could be stopped in the distance that the track could be seen to be clear?" A. "No sir, Mr. Comstock put his question to me in such a way that I could not answer that intelligently and the way I wanted to.

Now I call attention to this at this time, to that direct testimony of this witness, who testified as a witness for the plaintiff upon the former trial, and object to this question as incompetent, and improper for the reason that the counsel, will not be permitted to now ask a question, and seek to *illicit* an answer that is the same as the answer given by the witness when he testified before in this trial and then seek to impeach that by deposition taken sometime prior to that.

Overruled. Exception.

A. No sir.

Q. Are you familiar Mr. Borton, with the *l*ook of rules in force January 1st, 1911, the rules and regulations of the transportation department?

A. Yes sir.

Q. Calling your attention to Exhibit 3, I will ask you what that is?

A. That is the book of rules of the transportation department,—and rules and regulations of the transportation department, of the Union Pacific railroad.

Q. And were those rules and regulations in force on the first day of January, 1911?

Mr. Strode: The defendant objects to that question as no proper and sufficient foundation laid, and incompetent.

Overruled. Exception.

174 A. Yes sir.

Mr. Comstock: The plaintiff now offers in evidence Exhibit 2, being the blue print showing the situation of the yards at Sidney, of the Union Pacific Railroad Company.

Mr. Strode: Let the matter stand open as to whether I want to object to this on cross examination. I may want to object to that on cross examination.

The Court: So ordered.

Q. You were in the Sidney yards weren't you at the time Mr. Huxoll was killed?

A. Yes sir.

A. And you were there present at the location of the accident?

A. Yes sir.

Q. And before he was taken from under the engine?

A. I wasn't present at the time of the accident, I was there a few minutes after the accident.

Q. Now when you reached the point, did you make any observations to determine the locality or where the body of Mr. Huxoll first struck the ground?

A. Yes sir.

Q. Did you discover from your observations?

A. Yes sir.

Q. Now you may state to the jury about the location of the,—well state the,—state what you found *tat* disclosed the point?

A. About 15 feet west of the water crane I found marks in the snow in the middle of the track that indicated that he had been knocked down at that point, and as the engine proceed- westward it struck him.

Q. You could see the marks along the track?

A. Yes sir, marks in the snow, in the center of the track.

Q. How deep was the snow in the center of the track?

175 A. It varied slightly, and I presumed there was an average depth of snow, possibly two inches. It drifted a little in spots, some places it would not be two inches, and some places a little more. The marks started about 15 feet west of the water crane.

Q. That is where the first imprint of the body on the snow occurred?

A. Yes sir, it indicated that he was struck and knocked down there.

Q. And did you make any observations to determine the point where Mr. Dupont's grip was knocked out of his hand?

A. No, I didn't see his grip.

Q. Now can you tell the jury how far west of the water crane the pilot of the engine that ran Huxoll down, stood after it stopped?

A. Well, the body was about 75 feet west of the crane, I think that would make the pilot of the engine 15 or twenty feet west of the crane.

Q. How much?

A. 15 or 20 feet west.

Q. My question wasn't what I meant exactly. Since the engine was backing up. Now tell the jury how far the end of the tender of this engine was, west of the water crane when it stopped? This engine was backing up so that the back would be in front?

A. Yes sir. The west end of the tank would be about 150 feet west of the crane.

Q. And the west end of the tender would be the first point of contact with Huxoll?

A. Yes sir.

Q. Beca-se the engine was backing up, and the tender would be to the west?

A. Yes sir.

Q. Now, where was Mr. Huxoll when you first arrived at the scene of this accident?

A. The body was lying in the center of the track, almost against the ash pan, lying rather lengthwise of the track.

176 Q. And had it passed clear under the tender?

A. Yes sir, the tender had passed over him, and part of the engine. The rear part of the engine had passed over him.

Q. Was the engine blocked when you got there?

A. I do not understand what you mean by blocked?

Q. To keep it from moving?

A. The engine,—no, it wasn't necessary to block it. The brakes would hold it.

Q. Could you tell the jury how long the engine stood there before he was removed?

A. I could not say exactly, as soon as I found out what the situation was, I went to the telegraph office to arrange for a train to take him to the hospital, and that took some time, and by the time I got in communication with the superintendents office, to the time I got back down there his body had been taken out. I do not know just how long it was; time passes very fast in a case of that kind.

Q. I do not suppose you could tell with absolute accuracy, but could you give approximately, how long it was?

A. Possibly 20 or 30 minutes.

Cross-examination.

By Mr. Strode:

Q. Mr. Borton, I want to ask you something about this blue print. The blue print that has been identified here I think as Exhibit 2, shows all the tracks and buildings in the vicinity of where this accident happened?

A. Yes sir, as the tracks were at that time.

Q. It shows a lot of tracks that haven't anything to do with the matter of where this man was hurt?

A. Yes sir, it is a blue print of the entire yards?

Q. Now you noticed on this blue print at a point here, near the—near what is marked or identified as the turn table, a
177 dotted line coming out towards the main line, and then running off to the north east, again, and crossing and running down along east, probably a distance of seventy feet,—sixty or seventy feet away from the main line, and also an extention of it, of the same dotted line, across all the tracks to the south of the turn table, and branches at the point immediately south of the turn table, and north of the main line, one branch of the dotted line coming in a southerly direction across the tracks and another branch running off to the east. What is that line, Mr. Borton?

A. That must be the sewer or the water pipes.

Q. It is nothing that is on the ground?

A. No, I am not prepared to say which it is, I would imagine though it is a sewer. I imagine,—and it also runs away down here. I know there is an outlet to the sewer away down below the stock yards.

Q. I want to show you Exhibit 4, on the question of the location of the spot track, and the turn table, and the round house, and the wash house, and ask you to state after examining this exhibit, whether that exhibit shows the relative location of the wash house, to the turn table and to the round house, and to the main track and to the spot track and the relative location of the wash house, to the water crane down here between the main line, and the spot track and the turn table, its location to the water crane, and to the round house, and to the main track of the spot track, and to the location of the spot track, with reference to the wash house and the turn table, and the water crane?

A. Yes sir.

Q. Does that show it?

Mr. Comstock: That is objected to as your honor can see, this is not the exhibit embodied in the question and not the exhibit as offered in evidence.

178 The Court: Are you referring to Exhibit 2, in your question, or to the one the witness is holding in his hand.

Mr. Strode: The one that the witness is holding in his hand, Exhibit 4.

The Court: That is what I thought. Overruled. Exception.

Q. Now this Exhibit that you hold here, Exhibit 4, shows the main track,——

Mr. Comstock: The plaintiff objects to that question for the reason that it is not cross examination and if they want to identify exhibits of their own for the purpose of cross examination, we have a right to cross examine on them, and they can do the same. They should do it by direct examination of their own witness so the plaintiff can cross examine.

The Court: Do you have any objections to cross examination on this Exhibit 4?

Mr. Strode: No.

The Court: Proceed, then. You will be given an opportunity to cross examine with reference to its condition. Exception.

Q. Now, what I want to get at is whether this Exhibit 4, that you have here, shows the main track upon which this engine that Mr. Zimmer was operating at the time that Mr. Huxoll was injured, if that shows that track that that engine was running on?

A. Yes sir.

Q. The main track?

A. Yes sir.

A. And does it show the location of the water crane that you have testified to with reference to that main track and with reference to the spot track?

A. Yes sir.

Q. And does it show the point where Mr. Huxoll's engine was located on the spot track, and the point where the other engine was located on the spot track?

A. Yes sir.

179 Q. It shows that with reference to the main track and the water crane?

A. Yes sir.

Q. And it shows that with reference to the location of the turn table and the round house and the wash house?

A. Yes sir.

Q. And is that the way it existed in January, 1911?

A. Yes sir.

Q. Now, first eliminating from that all these other tracks that are south of the spot track, and north of it, except the one,——

A. Yes sir, the rest of them are left out.

Q. There were at that time no other tracks between this spot

track as shown on this Exhibit 4, and the main track of any point east of the turn table to the water crane?

A. No sir, it shows all the tracks that were there.

Q. And you would say that was a correct exhibition of the yards there with respect to the location of Mr. Huxoll's engine and Mr. Orton's engine, and the water crane and the main track and the turn table and the wash house and all in fact that shows upon this exhibit?

A. Yes sir.

Q. Now in Exhibit 2, the dotted line that is referred to shows that they were underground, and I think you said that upon this Exhibit there is shown a part of the round house, the new round house, is that right?

A. No, the new round house, would not show, the two old round houses.

Q. There were two?

A. Yes sir, the one sits back here, a little further than the other.

Q. It also shows the depot and all the buildings around there?

A. Yes sir.

Q. Around the station and around the hotel?

A. Yes sir.

180 Q. Does this other Exhibit 4, show the street?

A. No, I guess it doesn't.

Q. This Exhibit 2, shows the street that crossed the railroad tracks in the town of Sidney?

A. Yes sir, that shows the street.

Q. There is only one street that crossed the railroad track east of this water crane,—well there is the first street on this Exhibit, or in fact, what is the name of the street that crossed the railroad tracks east or west of the water crane?

A. Rose street,—immediately east of the passenger depot and the Union Pacific Hotel.

Q. And how far is that from the water crane, or where this engine or these engines were located?

A. Here is Rose Street?

Q. Yes sir?

A. I think it would be between 8 and 9 hundred feet. At one hundred feet to the inch it looks like that.

Q. And where is the first street that crossed the railroad track east of the water crane?

A. There are no crossings east at all.

Q. There wasn't?

A. No sir.

Q. So that there wasn't any crossing east of the vicinity of where this water crane is located?

A. No sir.

Q. Were there any foot bridges or side walk crossings for the public in general in between this point of Rose Street and east of the water crane?

A. No sir.

Q. Then would you say,—what would you say as to whether that

place all through there was in the private yards of the Union Pacific?

181 A. Yes sir.

Mr. Comstock: The plaintiff *how* renews the offer of Exhibit 2.

Mr. Strode: The defendant objects to this exhibit for the reason it is confusing and contains a lot of tracks and buildings that have nothing to do with the situation as to the place where this man was injured and just simply tends to confuse anyone in examining it, trying to see what the situation was at that point.

The Court: Exhibit Two, being a blue print of the entire yards of Sidney, objection overruled. The defendant excepts.

Redirect examination.

By Mr. Comstock:

Q. Just one question upon this map, if I may ask it now: Since this last question that Mr. Strode asked. Isn't there a general public hotel shown upon this map east of Rose street?

A. Yes sir, the hotel is shown there,—that hotel is built right against Rose Street.

Q. But it is east of Rose Street?

A. Yes sir, the hotel is east of Rose Street.

By Mr. Strode:

Q. I wasn't through cross examining him, Mr. Comstock: How far was this hotel that you just referred to from the water crane?

A. Oh, it is between seven and eight hundred feet, the hotel isn't very large.

Q. And it is on Rose Street?

A. Yes sir, in fact it sets partly in Rose street.

Q. I think you stated, Mr. Borton, that you were the yard master at the time of this accident?

A. Yes sir.

182 Q. I think you also stated that they have written rules governing the operation of the trains and the train service?

A. Yes sir.

Q. Now with reference to instruction. Oral instruction, by examiners, that examine the employees, of the company, what do those instructions or examinations cover with respect to the employees in the switch yard?

A. About the only examination they give the switchmen is upon signals.

Q. Signals?

A. Yes sir, signals and flagging, and ask them how to flag and that is about all there is to it.

Q. Those instructions do not deal with the operation of trains.

A. No sir.

Q. The book of rules deals with that?

A. Yes sir.

Q. And you are expected to follow those rules?

A. Yes sir.

Q. Now with reference to the matter of where Mr. Huxoll was hurt, you didn't see the accident, as I understand you?

A. No sir, I didn't see it.

Q. Do you not know from personal knowledge, where,—exactly where Mr. Huxoll was struck on the track?

A. Not exactly, I simply went by marks that I found in the snow.

Q. Now do you recall the fact,—did you take any exact measurement?

A. I went by the length of rails, as much as anything else.

Q. What I am trying to get at, Mr. Borton, is, do you recall the fact that Mr. Dupont was there?

A. I did not know until after the accident that Mr. Dupont was there.

Q. Well was your attention called after that time, that Mr. Dupont was walking down along there with Mr. Huxoll?

A. Yes sir, Afterwards.

Q. And was your attention called to the fact that Mr. Dupont was walking down ahead of Mr. Huxoll and that within about ten feet of the water crane?

183 Mr. Comstock: The plaintiff objects to that question as immaterial, improper cross examination, and immaterial.

Sustained. Exception.

Q. Would you say that it was not,—that it was 20 feet?

A. No sir, I could,—as near as I could come to it I would say it was about 15 feet. It might have been more.

Q. Well if it was about 15 feet, it may have been 20 feet?

A. Yes sir.

Q. And if Mr. Dupont who was there, fixes it at 20 feet, would you say that he was mistaken, and that you were correct in fixing it at about 15 feet?

A. Well if he was there at the time I would think that he would be more correct than I would. I was in the neighborhood of 15 feet.

Q. And you could see Mr. Huxoll's tracks in the middle of that main track, couldn't you?

A. Yes sir; those weren't exactly his tracks, it was the marks of his body.

Q. You could see it in the snow where he had been dragged back by the engine?

A. Yes sir.

Q. Do you know how long after he was hit by the engine, and how far he had been dragged under that engine, the tender of the engine, and the engine, before the engineer know that he had been struck?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial and improper cross examination.

The Court: Answer directly, yes or no. Exception.

A. I know approximately, by observations I took.

Q. Well you could see how far he was dragged in the snow, but

could you tell by looking at the tracks in the snow at what point i was in there that the engineer knew that he had been hit?

A. No sir, I could not say.

184 Q. It may have been half of the distance, before the en gineer knew that Mr. Huxoll had been hit, mightn't it?

A. Yes sir, it may have been more than that.

Q. There is nothing there to indicate or tell you how soon afte Mr. Huxoll was hit or what portion of that distance had been covere by that engine, before the engineer knew that Mr .Huxoll had bee struck?

Mr. Comstock: The plaintiff objects to that question as improp cross examination.

Overruled. Exception.

A. No sir.

Q. Did you see Mr. Dupont's grip that had been knocked out o his hand as he came down along the outside of that track?

A. No sir.

Q. Did you see any point in the snow where the grip had bee knocked out of his hand?

A. No sir.

Q. Did you look for any such thing?

A. No, I didn't look for it, I looked for the signes where M Huxoll had been struck in order that I could make my report a curately.

Q. You have to report all accidents?

A. Yes sir.

Q. And all of the employees who were there that know anythin about it, must make out a report about it?

A. Yes sir, and I do not remember of seeing any marks of th grip, but they may have been there.

Q. Now about the ice around the water crane, did you observe an ice around there that morning particularly?

A. Oh there was a few small spots of ice where the water ha splashed.

Q. What do you mean by spots?

185 A. I mean that the platform wasn't entirely covered.

Q. Where would it be with reference to the snow?

A. Well, just like any snow, where there had been water droppe into it, and around the platform, and close to the crane.

Q. Well, were you around that crane that morning?

A. I was by there several times.

Q. Was there any difficulty at all in passing over that platform

A. No sir.

Q. Or around it?

A. No sir.

Q. Any difficulty in walking across it?

A. No sir.

Q. Mr. Borton, in the space between the wash house and the mai track, and between the round house and the main track and th turn table and the main track, and the spot track and the mai

track, on down beyond the water crane, what is that space covered with, or was it on the first of January, 1911?

A. Well, it was covered with gravel and cinders, and it was an open way down there.

Q. What was its condition then as to being smooth and open,—a smooth and open path?

A. It was smooth and open.

Q. How wide a path was it from the wash house down to the turn table?

Mr. Rose: The plaintiff objects to that question as assuming that it was a path.

Sustained. Exception.

Q. How wide was this space covered with this gravel,—what kind of gravel was it?

A. What we call Sherman Hill.

Q. Was it the same kind of gravel that was all around that depot?

A. Yes sir, the main track from Omaha west is all the way.

Q. Well, was it the same as around the station and platform?

A. Yes sir.

186 Q. And the place where people got on and off the train?

A. Yes sir.

Q. What was that condition,—the condition of that space between the wash house directly east of the main track, and from thence east,—I mean directly south to the main track, and then that space directly east of the turn table?

A. It was all open and leveled off.

Q. With what?

A. Cinders and ballast.

Q. Is it in the same condition now if the jury would go out and look at it,—would it be in the same condition now as to this open space?

A. Yes sir, that is the same.

Q. And from the turn table on east to the water crane, what is that space,—how was that space filled or occupied?

A. It was the same. It all had been leveled off and the depressions filled in with gravel.

Q. What would you say as to it being perfectly smooth and level?

A. It was smooth and level.

Q. What was this space used for from the turn table on down past the water crane?

A. It was a space for the enginemen going to and from their engine.

Q. Going from what point to what point?

A. You might say it was a walk for anybody that had business down in this part of the yard.

Q. From where to where?

A. They would generally cross there,—it would depend upon where they started from.

Q. Well supposing they started from the wash house?

A. Well, the logical route was right down there to the spot track around the east end of the table.

Q. Was that the way they went?
A. Yes sir, as a general thing.
187 Q. To reach engines on the spot track even beyond the water crane, clear on down?
A. Yes sir.
Q. Or on the west side of the water crane, is that right?
A. Yes sir.
Q. Did the railroad company use it for anything else?
A. No sir, not at that time.
Q. They didn't?
A. No sir.

Mr. Strode: As a part of the cross examination of this witness, we want to offer at this time, Exhibit Number Four.

Mr. Rose: The plaintiffs have no objection, except there are certain points indicated on it,—we object to the exhibit in so far as it purports to indicate and assume the place of the accident, or in so far as it purports to exhibit the yards themselves. If it is only intended to mark certain places, we do not care about it. We won't have any objection to it.

The Court: It is only introduced to show the relative distances between places referred to.

Exhibit 4, received in evidence and shown to the jury, and the same is hereto attached and made a part of this record.

Q. Now, Mr. Borton, there is a point on the exhibit 4, that is marked wash house, and locker house?
A. Yes sir.
Q. Is that the wash house you refer to in your testimony?
A. Yes sir.
Q. Immediately south of that,—now this point here, where it says wash and locker house, that is the wash house that is referred to in your testimony?
A. Yes sir.
Q. The railroad tracks or these lines here, indicating tracks shown on that line, what direction are they from this wash house?
188 A. South.
Q. So that the top of this exhibit would be north?
A. Yes sir.
Q. And the bottom of it would be south?
A. Yes sir.
Q. Then that end would be east, and this end would be west, (Indicating)?
A. Yes sir.
Q. Then the main tracks are immediately south of the wash house?
A. Yes sir.
Q. Where it says on this blue print, "Engine house"?
A. Engine house.
A. Engine house.

Q. Is that one of the round houses you talk about in your testimony?
A. Yes sir.
Q. And where it says round house, what is that?
A. The other round house.
Q. Those are two round houses you have spoken of in your testimony?
A. Yes sir.
Q. Where it says here, "Turn table" what does that mean?
A. The turn table where the engines are turned.
Q. These lines running in toward the engine house, what are they?
A. Tracks for getting engines to and from the round house.
Q. Engines run on these tracks and the turn table is fixed to meet one of these tracks, and the engine run into the engine house?
A. Yes sir.
Q. This line running on the west side, down toward the main line what track is that?
A. That is a track that was generally for spotting the west bound passenger engines.
Q. Now at the east end,—at the east side of this turn table it is shown on this exhibit, there is a track coming out east and running down along until it comes down here, what track is that?
189 A. That was known as the spot track.
Q. What spot track with reference to Mr. Huxoll's injury?
A. It was used for engines to come out of the house, that would go east, and occasionally west bound engines were set out there when the round house force gets through with it.
Q. Well, is that the spot track that you have been talking about in your testimony, and that Mr. Huxoll's engine was on, Mr. Borton?
A. Yes sir.
Q. And where was the water crane?
A. Just about near that ruler there.
Q. Does it say water crane?
A. It says, "Stand pipe".
Q. Right there. (Indicating.)
A. Yes sir.
Q. Where there is a square place with a line running out with an arrow?
A. Yes sir.
Q. There is where the water crane was?
A. Yes sir.
Q. What are these dotted lines north of the water crane in there?
A. Where?
Q. Is that an extention of the spot track?
A. I have an idea that is what the lines were meant for.
Q. There then, is the water crane? (Indicating.)
A. Yes sir.

Q. This then immediately south of the water crane, is the main track?

A. Yes sir.

Q. Now is that the main track that you have been testifying about where Mr. Zimmer's engine was,—the switch engine that was being operated at the time Mr. Huxoll was injured?

190 A. Yes sir.

Q. And is this space where you see this stand pipe and water crane, is that the space you have been talking about between the spot track and the main line, where it comes up here,—is that the space where it lies in here, where it is covered with Sherman Hill gravel?

A. Yes sir.

Q. How far is that space at its narrowest point between the turn table and the main line,—how wide is it?

A. Twenty-seven feet, seven inches.

Q. It is from the south side of that turn table, to the north rail of the main line, it is twenty-seven feet and seven inches?

A. Yes sir.

Q. Was there anything in that space?

A. No sir.

Q. And do you know how wide this space is in here between the engine house,—the round house, and the main line?

A. That would be about 60 or 70 feet.

Q. It would be about the same distance it was from the wash house to the main line?

A. Yes sir.

Q. That is practically on the same line?

A. Yes sir.

Q. And that space was cut off first, or narrowed, by the turn table?

A. Yes sir.

Q. And narrowed down to that point to twenty seven feet and seven inches?

A. Yes sir.

Q. Then immediately east of that space it widens again to the distance between the spot track and the main line?

A. Yes sir.

Q. This space, that was used in going down to this engine down here?

A. Yes sir.

191 Q. There is on this blue print, what appears to be engines, —drawings that might indicate them, that might be locomotive engines?

A. Yes sir.

Q. As to whether that is the exact location of those two engines, you are not able to state?

A. No sir.

Q. That is just approximately as near as it could be figured out would be where they would be with reference to the water crane?

A. Yes sir.

Q. There was one of the engines that was supposed to be at the water crane?
A. Yes sir.
Q. That would be this one, the one furthest west?
A. Yes sir.
Q. And the other one was immediately east of it?
A. Yes sir.
Q. That would be this one?
A. Yes sir.
Q. This engine was east,—do you recall or do you know,—was it Mr. Huxoll's engine or the other engine?
A. I do not know which engine it was e-st.
Q. You do not know whether,—you do not know which of those engines was east or which west of the water crane?
A. No sir.
Q. Which way were those engines headed?
A. I presume they were both headed west, they were ordered to be headed west.
Q. You presume they were both headed west?
A. Yes sir.
Q. And backed out of the round house?
A. Yes sir.
192 Q. And you would presume they were to back to Perdue and pick up that freight that was out there?
A. Yes sir.
Q. You understand that the first engine that had backed out and came out on the spot track from the round house, had taken water?
A. Well, I could not say as to that, or I do not know which way the engines were brought out.
Q. Well, after they did come out, the first engine would take water and then it would back back that way, (Indicating)?
A. Yes sir, that would be the natural movement.
Q. You have told approximately where you thought he was struck with reference to the water crane here?
A. Yes sir.
Q. And you have also stated about how far away from there he was when it stopped?
A. Yes sir.
Q. And I think this distance as shown here, Mr. Borton, is 70 feet from the point where it is indicated that it was the location of the accident on here,—of course that should be the location of Mr. Huxoll after the accident?
A. Yes sir.
Q Now how far did you say it was,—
A. I believe I said it was 75 feet.
Q. Well, it is right in that neighborhood?
A. Yes sir.
Q. Seventy or seventy-five feet from the point of this water crane, to the point where Mr. Huxoll was under the engine when it stopped?
A. Yes sir.

Q. And the point where it struck him was fifteen or twenty feet, or in that neighborhood west of the water crane?

A. Yes sir.

Q. And the difference between the 15 and 20 feet, and the 70 and seventy-five feet was the distance that he had been dragged under the engine?

193 A. Yes sir.

A Juror: Do you say that Mr. Huxoll was east or west of the water crane?

A. West.

Q. How far west of the water crane do you say that Mr. Huxoll was?

A. The first evidence I found would indicated that the body had been knocked down, would indicate that there had been a body there.

Q. Well the water crane shows here at the end of this pointer indicated on the blue print?

A. Yes sir.

Q. Mr. Huxoll as you understood was coming from this wash house, coming down here and down between the two tracks of the main line down to a point within fifteen or twenty feet of this water crane, before he got hurt?

Mr. Comstock: The plaintiff objects to that question as improper cross examination, and assuming a fact that has not been established at all.

Sustained. Exception.

Q. Well, you understood that Mr. Huxoll was coming down here from the wash house, and he was going east?

A. Yes sir.

Q. And he hadn't reached the water crane?

A. No sir.

Q. And the indications were that he was struck between the two tracks of the main line and west of the water crane?

A. Yes sir.

Q. Now the distance between the spot track and the main line at the point right here where the water crane is, I think you said was 12 feet?

A. That was as near as I could tell, and I measured it a second time.

Q. Well, I think it was stipulated here that that was 12 feet, and of course as you went further west, that distance increased?

A. Yes sir.

194 Q. Until at this narrow point it was twenty-seven feet and seven inches?

A. Yes sir.

Q. And between that main line,—between this south track of the main line, and the north rail of the track south of it, there was another track south of this one, wasn't there?

A. Yes sir.

Q. This is the main line, and here is another track that lies along parallel with it, south of it?
A. Yes sir.
Q. Now, what is the space between the south line of the main line, and the other track?
A. That must be 14 feet,—I think those figures there indicate it.
Q. It is 14 feet between the main line on the south side, and the nearest track to it on the south side?
A. Yes sir.
Q. And that was all the way down to this water crane?
A. Yes sir.
Q. And passed the water crane, clear on down to here?
A. Yes sir.
Q. And then as you say, north of it was this space here?
A. Yes sir.

A Juror: Were there any more tracks right north of the main line track, in that space between the turntable, and the main track?
A. There wasn't at the time of the *time of the* accident. There was no more tracks there.
Q. Nor along west of the turn table, except that one track there?
A. Just the one track.
Q. This shows the tracks as they were at that time?
A. Yes sir.
Q. Since that time, you have built a track along here?
195 A. Yes sir, a track parallel with the main track, between the main track and the turn table. Nest to this track,—it is simply increasing the length of the spot track.
Q. This is the way it was then?
A. Yes sir.
Q. This doesn't show the hotel?
A. No sir.
Q. It doesn't show Rose street?
A. No sir.
Q. Nor the coal chutes?
A. No sir.
Q. It shows the cinder pit?
A. Yes sir.
Q. Nor it doesn't show the hill?
A. No sir.
Q. Now there are other tracks aren't there south of these tracks?
A. Yes sir.
Q. And are there other tracks north of these two tracks here?
A. Yes sir.
Q. And were at that time?
A. Yes sir.
Q. And was this the nearest one that was north of this track?
A. Yes sir.
Q. And was this second one shown here going through the ash pit?
A. Yes sir.

Q. And then the others were still north of that?
A. Yes sir.
Q. Quite a ways north?
A. Yes sir.
A. Yes sir.
Q. They are shown on the other blue print?
A. Yes sir.

196 Redirect Examination.

By Mr. Comstock:

Q. Now Mr. Borton, this circle right here, is the turn table pit, (Indicating)
A. Yes sir.
Q. And the distance here you said was 27 feet seven inches?
A. Yes sir.
Q. Now tell the jury how you turn that turn table?
A. Well, it is turned with a motor and there is also an arm at each end of it that extends out.
Q. Now tell the jury the distance that this arm extends out from this turn table pit?
A. I think it is about 12 feet.
Q. So that twelve feet then if the arm was out there, would come off of this 27 feet, distance, between the main line track and the turn table pit?
A. Yes sir.
Q. Now it is 12 feet down at the water crane, between these two tracks?
A. It is my impression it may be more than that.
Q. Now is this pipe that comes up from the ground, that you call this water crane, is that in the center between the main line track and the spot track?
A. Yes sir.
Q. And what is the diameter of that pipe?
A. I think it is a 12 inch stand pipe.
Q. 12 inches?
A. Yes sir.
Q. And that would leave five feet six inches on each side of the pipe, between the pipe and the rail?
A. Yes sir, it *it* is 12 feet, it says 17 feet. There is some measurement here somewhere that would indicate just what that was.
Q. So if it is,—that is your impression?

197 A. Yes sir.
Q. And it is your impression from your own measurements?
A. Yes sir, but I may have forgotten it.
Q. Well, that has been your impression at all times you have testified?
A. Well, at other times when I testified I had the measurement then before me.
Q. Well, don't you remember then what you said?

A. No sir.

Q. So that that would leave five feet and a half between the rail of each track, the spot track, and the main line track, and the pipe?

A. Yes sir.

Q. And that is the place where the water came down running out of the goose neck?

A. Yes sir.

Q. And that is where the ice was?

A. There was some little ice there.

Q. When ice was there, that is where ice was?

A. Yes sir.

Q. And ice was there in cold weather?

A. Yes sir.

Q. And this was 18 degrees below zero?

A. Yes sir.

Q. And at that time, these two engines stood on the spot track directly north of the water crane?

A. Well, I suppose they stood there, I could not locate the position of those engines, and I have never tried to.

Q. Now that mightn't have been more than 10 feet where this body lay on the ground west of the water crane?

A. I think it would be 15 feet, that would be my judgment.

Q. Well, would you want to say it wasn't ten feet?

A. I would be inclined to say it was more than ten feet.

198 Q. Well, it is just as likely to be 10 feet as twenty?

A. I do not think so.

Q. Why?

A. Well, I would jusge the distance by the length of the 33 foot rail.

Q. And you fix it at 15?

A. Yes sir.

Q. And that is what you fix it now?

Q. Now the smoke and steam that was going over this track was coming from the round house, cinder pits and from these engines inside or along side of it?

A. Yes sir.

Q. Was blowing south?

A. Yes sir.

By Mr. Strode:

Q. Mr. Borton, Judge Comstock asked you about there being some sort of an arm that was used to operate this turn table at times?

A. Yes sir.

Q. And I think you said that was 10 or 12 feet in length?

A. Yes sir.

Q. One or two planks?

A. One at each end.

Q. Sticking into something on the turn table?

A. Yes sir, some brackets or sockets and then you just push it around.

Q. Then you just push it around?

A. Yes sir.

Q. Is that left in when the turn table is not being used?

A. Yes sir, at all times.

Q. And if the turn table was turned around so that it stood north and south, that would be on the south side, wouldn't it?

A. Yes sir.

Q. That is, that pole or plank, would be sticking out on the south side?

199 A. Yes sir.

Q. And if it was turned the other way around it would be sticking out on the north side?

A. There was one at each end.

Q. But is there a pole on each end?

A. Yes sir.

Q. Then of it was turned to the north side there would be a pole on each end?

A. Yes sir.

Q. And if it was turned east or west or any other direction, the arm would be in those directions?

A. Yes sir.

Q. When the air motor,—what is that used for?

A. That is used for turning the engines. There is an air motor in connection with the turn table, that turned the engine. But it didn't work at all times; it would occasionally get out of order, and these poles were on there in order to turn it when it was out of order.

Q. If the pole was turned to the south, it would reduce the space that a man would have to walk in around there to about 12 feet?

A. Yes sir.

Q. That is, at the point immediately south of the turn table?

A. Yes sir.

Q. And you understood did you, that Mr. Huxoll got into the main track between the two tracks on the main track, at a point right opposite the turn table?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial, incompetent, improper cross examination, and assuming a fact not established or in evidence.

Sustained. Exception.

200 Q. How far would it be, Mr. Borton, for a man who is walking down the center of the track, between the two rails of the main line, how far would it be from his position in the center of the track to the space south of the track, between the two tracks there of some twelve feet wide, or north of the open space you have testified to?

A. Those rails are four feet eight and a half inches apart inside, and it would be only two feet four and a quarter inches.

Q. It would be two feet, four and a quarter inches to a path on either side of that main line, either south of it or north of it?
A. Yes sir.

By Mr. Comstock:

Q. How deep is the turn table?
A. Well, the cinder pit, I expect is about ten feet, but there is a wall of cut stone around there, that is probably four feet or possibly five, straight down, and then there is a slope down to the center.
Q. So that this whole circle here, of the turn table is an open hole, the shallowest place of which is four feet deep, is that right?
A. Yes sir.
Q. And 90 feet across it?
A. I believe that is a ninety foot table.
Q. You think it is a 90 foot table?
A. Yes sir.
Q. I just wanted to ask you Mr. Borton, if the engine number two hundred and thirteen that ran Mr. Huxoll down, was a switch engine, or a road engine?

Mr. Strode: The defendant objects at this time to the use of the expression "ran Mr. Huxoll down" as not a proper expression.
Mr. Comstock: You can use just the word you want to use, Mr. Strode.
(No ruling.)

201 Q. Now Mr. Borton, will you kindly tell the jury whether engine number two hundred and thirteen, was a road engine or a switch engine?
A. It was a road engine.

By Mr. Strode:

Q. And is a road engine used for both road and yard purposes in switching?
A. They are, in emergencies.
Q. The fact is, the road engine has to do about as much or more switching than the switch engine?
A. Well, of course along the line.
Q. A road engine has to do its own switching?
A. Yes sir.

By Mr. Comstock:

Q. In the Sidney yards, they were used only in emergencies?
A. Yes sir.

Mr. Comstock: That is all.

Witness excused.

Mr. Comstock: The plaintiff now offers in evidence the deposition of Thomas Orton. (Deposition here follows.)

THOMAS ORTON, being first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and says as follows:

Examination by Mr. Hogland:

Q. Give your name, age, residence and occupation.
A. Thomas Orton, residence North Platte, Locomotive engineer, 28 years old.
Q. Employed by the Union Pacific Railroad Company?
A. Yes sir.
202 Q. How long have you followed the occuptaion of locomotive engineer for this company?
A. I think I was promoted in April, 1897?
Q. You have been an engineer since that time?
A. Yes sir.
Q. Were you in Sidney on January 1, 1911?
A. Yes sir, the morning of January 1, 1911.
Q. Are you acquainted Mr. Orton, with the rules of the Union Pacific railroad company, with reference to the operation of engines and the operation of switch engines in the yards at that time?

Defendant excepts and objects to the question for the reason that it assumes a state of facts not proven.
Overruled. Exception.

A. Yes sir.
Q. Were you acquainted with Fred Huxoll on that date and prior thereto?
A. Yes sir.
Q. Were you called to go out on that date here in Sidney?
A. Yes sir.
Q. And with Mr. Huxoll?
A. Yes sir.
Q. And for what purpose were you called?

Defendant objects to that question as immaterial. Sustained. Exception.

Q. A train of freight for the Union Pacific?
A. Yes sir.
Q. What time were you called?
A. I think the call was for 11:10 A. M.
Q. Were you with Fred when he was called?
A. Yes sir.
Q. Where were you when you were called?
A. We were at Mrs. Burke's house.
Q. Did you and Fred go to the wash house together to prepare?
203 A. Yes sir.
Q. Who left the wash house first?
A. I did.
Q. Did any one leave with you?
A. I think not.
Q. Who was in the wash house when you left?

A. Huxoll was there I know. I do not know whether his fireman was with him or not, not being acquainted with him at that time.

Q. Where was Fred Huxoll when you last saw him, before the accident?

A. In the Wash house.

Q. Where were you at the time the accident occurred?

A. I was either in the cab of engine 1913, or else had just got down on the north side of the engine 1913. I could not say which place.

Q. Was that the engine you were called to take out?

A. Yes sir.

Q. Where were the engines standing?

A. At the water crane.

Q. Where at the water crane?

A. At the water crane on the north side of the main track.

Q. How long was you at the engine before the accident occurred?

A. I could not say; not over two or three minutes anyway. Not longer than that, maybe not that long.

Q. What was the condition of the weather in the yards at that time?

A. The wind was blowing from a northeasterly direction. I do not know whether it was directly north or not. A pretty strong wind, and it was snowing and there was considerable snow on the ground.

The defendant excepts and objects to the question and moves to strike from the answer the following words, "The wind was blowing from a northeasterly direction. I do not know whether it was directly north or not. A pretty strong wind," as not responsive to the question, and a mere voluntary statement of the witness.

204 Overruled. Exception.

Q. What was the condition as to the steam from the round houses? round houses?

A. The steam and smoke, of course, was drifting from the round house over the tracks, being south of the houses.

Q. What was the condition of the weather as to temperature?

A. Well I cannot say exactly. I would say from 10 to 15 below zero.

Q. Could you see that morning, very distinctly?

A. Not through the steam and snow.

Q. How far could you see a person in front of you?

A. There were times you could see quite a distance, and there were times when the wind struck the steam, that you could not see at all?

The defendant excepts and objects to the question and moves to strike from the answer the following words "When the wind struck the steam" as not responsive and a mere voluntary statement of the witness.

Overruled. Exception.

Q. What course did you take to go from the wash house to the engine?

A. I went on the south side of the turn table pit, down to the engine.

Q. Which side of the water crane did you go on?

A. The engine was being spotted at the water crane, it was not necessary for me to pass the crane.

Q. Did you in passing around there,—did you reach the main line track?

A. It was not necessary for me to go on the main line track.

Q. As a matter of fact, did you get on the main line track, on this morning going down?

A. Not that I know of.

Q. While you were going down was the air there filled with steam and smoke and the wind?

A. There was a good deal of steam and smoke around the locality where my engine was setting. A little farther west wasn't so

205 bad.

Q. In walking down from the wash house to your engine, in the yards, through the steam and smoke, in the condition that it was in, could a person tell at all times whether they were getting out upon the main line track or not?

The defendant objects to the question as irrelevant, and immaterial, and no proper foundation laid, and calling for the conclusion of the witness.

Overruled. Exception.

A. I think a man could tell where he was going, up until the time he got down to my engine, and from there on I don't know.

Q. Where was the Huxoll engine at that time with reference to your engine?

The defendant objects to that question as immaterial.

Overruled. Exception.

A. I think the engine was standing just east of the water crane. That would be just back from my engine.

Q. How far from your engine?

A. I couldn't say what the distance would be.

Q. How far was it from your engine to the next track north?

A. Well, I could not say just how those tracks used to lay in there, I could not say. Only guess work as to how far that track was north.

Q. Do you know whether there was a pile of iron in that vicinity on the north side?

A. I don't remember whether there was a pile of iron there or not.

Q. Now, with the engine which Huxoll was to go to at the location it was in, your engine being to the west, what would have been the usual course for him to have taken to get to his engine?

The defendant objects to the question as immaterial and irrelevant, and no proper foundation laid, and calling for the conclusion of the witness.

Overruled. Exception.

206 A. A man had practically a clear track as near as I can remember, either to the north or south to go to the engines, with the exception, of course of the water crane.

Q. Do you know what if any ice there was in the vicinity of the water crane that morning?

A. I don't know how much ice there was around it. Of course there was more or less water spilt from taking water out of this crane, and, of course, we had had nice weather up until this time, and I do not know how much ice had accumulated around there.

The defendant moves to strike from the answer the following words "Of course there was more or less water spilt from taking water out of this crane, and, of course, we had had nice weather up until this time" as not responsive to the question, and a mere voluntary statement of the witness.

Sustained. Exception.

Q. Could a person have passed between the water crane and the main line track on the south without getting into the ice?

Defendant objects to that question as immaterial and irrelevant, without proper foundation laid, and leading and suggestive, and calling for the conclusion of the witness.

Overruled. Exception.

A. Well, if this place was froze over with ice like they are sometimes in the yards, you would have to cross the ice.

Defendant moves to strike out the answer of the witness for the reason it is argumentative, and not responsive and states a conclusion and not a fact, and contains an assumption of fact not proven.

Sustained. Exception.

Q. Then would the usual course have been to have gone across directly south and then around the water crane to the east?

Objected to as leading, and assuming facts not in evidence and calling for the conclusion of the witness and no proper foundation laid.

207 Sustained. Exception.

Q. Would Mr. Huxoll in going from the wash house to his engine at the place it was located, if he did not cross the main line, had to have crossed the track on the north of the water crane, to get to his engine?

A. He would have had to cross the spot track in order to get there, or else,——

Q. Then if in the condition that things were in there that morning, if he had not of crossed the spot track, on the north, he would have had to cross the main track on the south or else have gone through the ice at the water crane?

Defendant objects to the question for the reason it is argumentative and calling for the conclusion of the witness, and not for a fact, and assumes facts not proven, and as immaterial, irrelevant and

incompetent, and it assumes there was ice around the water crane that would interfere with a man walking on past the water crane.
Overruled. Exception.

Q. He would have had to have either that way, or across some of the tracks.

Defendant moves to strike out the answer of the witness for the reason it is argumentative, and not a statement of a fact, but a mere conclusion and opinion of the witness, and immaterial irrelevant and incompetent.
Overruled. Exception.

Q. You know Mr. Zimmer the engineer of the switch engine do you?
A. Yes sir.
Q. Did you see the switch engine coming up from the east on this morning?
A. I did not.
Q. How close was your engine to the main track upon which the switch engine passed at that time?
208 A. Those tracks I think are about 15 feet between centers. 17 feet.
Q. Then you were within 17 feet of the swtich engine when it passed there at that time?
A. I would say from 17 to 25 feet, somewhere along there.
Q. You could not hear his engine when it passed?
A. I did not notice.
Q. You did not notice particularly any sound from his engine?

Defendant objects to that question as immaterial and irrelevant.
Overruled. Exception.

A. Not in that kind of weather; the engine does not make a good deal of noise.

Defendant moves to strike out the answer of the witness as argumentative, and stating an opinion and a conclusion of the witness rather than the fact, and not responsive.
Overruled. Exception.

Q. Did you hear any voice, or any one yell at that time, or just afterwards?
A. Not until after the accident.
Q. You did not hear Dupont yell?
A. Dupont was the man — told me that Huxoll was in under the engine.

Defendant moves to strike out the answer as not responsive.
Overruled. Exception.

Q. Was that the first you knew of any accident?
A. That was the first I knew.
Q. Then was when you went up there?
A. Yes sir.
Q. Did Dupont come down and tell you?

A. Dupont run up towards the front end of my engine, and yelled he says "My God Tom, Fred is under an engine."

209 Q. You went there immediately?

A. Yes sir.

Q. And found Fred under the engine?

A. Yes sir.

Q. Where was that with reference to the water crane?

A. It was just 72 feet, it has been measured.

Defendant moves to strike out the answer as not responsive and vague and indefinite.

Overruled. Exception.

Q. Did you notice this place where Mr. Borton said there were some marks in the snow, indicating where it had struck him?

A. I did not pay any attention to that. When I saw the man under the engine the main thing was to get him out.

Q. Did you help get him out?

A. Yes.

Q. How long were you getting him out?

A. Forty-five minutes.

Q. What did you do there?

A. I got under the engine. Had to take down brake-rods to get him loose. He was wedged under the brake-rods and hangers under the left driver.

Defendant moves to strike from the answer the following words "was wedged under the brake rods and hangers under the left driver," as not responsive to the question and a mere voluntary statement of the witness.

Sustained. Exception.

Q. What were the injuries upon him?

A. Of course, we could not tell, only what was in sight, was the right arm, the left main driver was standing on it, at about the cuff of his glove, and he had a bad scalp wound, and they afterwards found that the arm was torn out at the shoulder, but he was rolled up in his storm coat.

Q. Did you help get him out from there?

210 A. I helped to get him out, and there were plenty others to take him.

Defendant moves to strike from the answer the following words "and there were plenty others to take him" as not responsive and a mere voluntary statement of the witness.

Sustained. Exception.

Q. Did you talk with him?

A. I talked with him some what was necessary about getting him out.

Q. Was anything said by Huxoll about the accident.

A. I don't remember what he said at the time.

Q. Did he know who struck him?

A. Afterwards.

Q. Where was that?
A. On the road to Cheyenne?
Q. Did you go with him to Cheyenne?
A. Yes sir.
Q. How long after the accident did this talk occur?
A. About two hours after we got him out.
Q. That was on the way to Cheyenne?
A. Yes sir.
A. He was hurried to Cheyenne was he?
A. Yes sir.
Q. Were there some doctors with him?
A. Dr. Mantor was with him.
Q. What was it Fred said?

Objected as incompetent, irrelevant and immaterial and hearsay, and not being part of res *jesta*.
Objection withdrawn.

A. He asked what engine it was that struck him, and I told him engine 213.
Q. Did you see the condition of his wounds when they got him to Cheyenne and undressed him?
A. Yes sir.

211 Q. Now, Mr. Orton, was there a rule or custom with reference to the operation of switch engines in the yards in connection with the yard business, and how they should be operated with reference to the safety of employees and other persons.

Defendant objects to the question as no foundation laid and assuming a state of facts not proven, and not the best evidence, and calling for the conclusion of the witness.
Overruled. Exception.

A. Yes, they have rules about operating engines.

Defendant moves to strike out the answer for the reason there is no foundation laid, assuming a state of facts not proven, not the best evidence, and calling for the conclusion of the witness.
Overruled. Exception.

Q. And was there any special rule with reference to stormy weather, such as was the condition at this time?
A. Not any I know of, only the general rules.
Q. What was the general rule.

By Mr. Sheean:

Q. Were those rules in writing?
A. I don't know of any special rules.

By Mr. Hoagland:

Q. Do you know of any special bulletin with reference to it?
A. None that I know of at that time, any special bulletin in the Sidney yards.
Q. Was there any special bulletin with reference to the operation

of engines that applied to the engines, outside of the rules in the general book of rules at the time in question?

Objected to for the reason that if there is a bulletin it must be in writing, and calls for hearsay, and no foundation laid.

Sustained. Exception.

212 A. There is none that I know of.

Q. And referring to the book of rules I ask you if it is the book I hand you now?

A. I think that is the book that was in effect at the time.

Q. And you know of no other bulletin with reference to the operation of trains outside of what was in these rules—in the operation of switch engines. I will have to change that from trains—outside of the Sidney yards? I will ask you if there was a special bulletin issued with reference to the Sidney yards on January 1, 1911?

Objected to as incompetent, irrelevant and immaterial, not the best evidence and for the further reason that the witness hasn't shown that he knows personally that there was a bulletin issued, and calling for the conclusion of the witness, no proper foundation laid, and further the question is not limited to the time before or at the time of the happening of the accident.

Overruled. Exception.

A. Yes sir.

Q. That bulletin should have been dated when? To refresh your memory I will ask you about a bulletin in which the following language was used. "Approach Sidney station carefully and look out for steam from round house blowing across the tracks."

Defendant objects to all of the question except "That bulletin should have been dated when?" for the reason that the witness is incompetent, and it assumes a state of facts not shown to have existed at the time referred to, and not being limited to a time prior to or at the happening of the accident, and no foundation laid.

Sustained. Exception.

(At the time of the trial Mr. Strode one of the attorneys for the railroad company, the defendant, made the following objection.)

Mr. Strode: The defendant objects to the reading of that
213 question to the jury. The court is now fully advised that that testimony is incompetent, and prejudicial, and should not be submitted to this jury, and it should not be permitted,—counsel should not be permitted to incorporate the language of incompetent testimony in his question.

The Court: Decision reserved.

Q. With reference to the stationing of a switchman upon the switch engine, and in the operating of the switch engine without them, what is in the books of rules just referred to?

A. Nothing that I know of.

Q. Was there any custom in vogue that you know of in the Sidney yards at the time with reference to the operation of switch engines other than these rules?

A. Not that I know of.

Cross-examination by Mr. Sheean:

Q. The bulletin you referred to as having been issued on January 1st, 1911, was issued how late in the day, about?

A. That bulletin was issued in the afternoon. Along about 7 or 8 o'clock.

Q. The yard, Mr. Orton, all the way up from the wash house along the main line track is all practically dead level is it?

A. All on a practical dead level.

Q. And is filled with Sherman gravel?

A. Yes sir.

Witness excused.

CLOYD M. JOHNSTON, Called as a witness on behalf of the plaintiff, was first duly sworn and testified as follows upon examination:

By Mr. Rose:

214 Q. What is your name?

A. Cloyd M. Johnston.

Q. Where do you live?

A. Kearney, Nebraska.

Q. What is your business?

A. Road man.

Q. What division?

A. I have the Kearney Branch and the Hastings extension.

Q. For what road?

A. The Union Pacific.

Q. The defendant in this case.

A. Yes sir.

Q. When did you come to Lincoln upon this occasion, yesterday?

A. I arrived here yesterday noon at 11 o'clock.

Q. Was Charles B. Matthews upon the train upon which you rode?

Mr. Strode: The defendant objects to that question as immaterial, and incompetent.

Overruled. Exception.

A. He wasn't upon the train that I arrived here upon, but he was on the train with me from Grand Island to Valparaiso and at Valparaiso we changed cars.

Q. You changed cars at Valparaiso?

A. Yes sir.

Q. Where is Mr. Matthews now?

A. I could not say, that is the last I seen of him.

Q. And had he told you he was coming to this trial?

A. Well no, I do not know as there was anything much said about that, of course we knowed we were both coming on the trial but we didn't converse very much about the trial at all. There wasn't any conversation held as to anything about the trial.

215 Q. You knew he had testified in this case before?

A. I was acquainted with him, yes sir.

Q. You knew he had testified in this case before?

A. Yes sir.
Q. And that he had started to come here to attend the trial on this occasion?
A. Yes sir.
Q. Did you give him any money on this trip?
A. No sir.
Q. Did you make him any promise of any money?
A. No sir.

Mr. Strode: We stand ready *to* this time to try with Mr. Rose, whether or not he is hiding a crooked witness——
(At this point Mr. Rose objected to Mr. Strode's remarks and both attorneys engaged in a rather heated discussion.)
The Court: It now being 5 o'clock P. M. gentlemen of the jury, we will adjourn until 9:30 A. M. the following day, October 16th, 1913.

9:30 A. M. October 16th, 1913, court met pursuant to adjournment, and the following proceedings were had and done.
Mr. Comstock: The plaintiff offers in evidence the deposition of J. A. Nicholson.
Mr. Strode: Mr. Nicholson is here in this room at this time, and if he cares to have Mr. Nicholson testify he must be called in person.
The Court: That is right.

J. A. NICHOLSON, called as a witness on behalf of the plaintiff, was first duly sworn, and testified as follows upon examination by Mr. Comstock:
216 Q. Where do you live?
A. Sidney, Nebraska.
Q. What is your age?
A. 34.
Q. What is your occupation?
A. I am the foreman of the mechanical department of the Union Pacific Railroad at Sidney.
Q. And now in the employ of the Union Pacific Railway?
A. Yes sir.
Q. How long have you been in the service of that railroad?
A. A little over 11 years.
Q. How long were you in the capacity that you are now serving?
A. About 9 years.
Q. Were you in its employ on the first day of January, 1911, Mr. Nicholson?
A. Yes sir.
Q. In what capacity were you serving it then?
A. Foreman of the mechanical depa*tr*ment at Sidney.
Q. The same position you now hold?
A. Yes sir.
Q. What are your specific duties Mr. Nicholson as foreman of the mechanical depa*tr*ment?
A. I have charge of the round houses and the car departments.

Q. Car Departments?
A. Yes sir.
Q. You do not have charge of the yards as I understand it?
A. I have charge of the car inspectors in the yards.
Q. Do you have charge of the operation of trains and engines in the yards?
A. No sir.
Q. And didn't have at the time that the deceased, Huxoll was injured?
217 A. No sir.
Q. You didn't see this accident to Mr. Huxoll?
A. No sir.
Q. And personally don't know anything about how it happened?
A. No sir.
Q. Where were you at the time it happened?
A. I was on an engine that was standing at the water crane.
Q. Which side of the water crane?
A. Directly at the water crane, taking water.
Q. On the north or south.
A. On the south,—north.
Q. On the spot track?
A. Yes sir.
Q. Whose engine was that?
A. That was the engine Mr. Orton was going out on.
Q. And you were on that engine?
A. Yes sir.
Q. Do you remember the number of that engine?
A. 1913 I believe.
Q. Do you remember which side of Mr. Huxoll's engine that stood?
A. Yes sir, Mr. Huxoll's engine was directly east of that engine.
Q. And the Orton engine stood right at the crane?
A. Yes sir.
Q. Taking water?
A. Yes sir.
Q. Now do you remember, Mr. Nicholson, about the number of engines that were standing about there, or whether there were any engines there steamed up?
A. Where do you mean?
Q. About the coal pits?
A. Yes sir, there were three or four engines around there.
Q. Besides these two?
218 A. Well there was probably three besides these two, and possibly four.
Q. Between the water crane and the round house?
A. Well, between the water crane and the ash pit, and the east end of the coal chutes.
Q. Well they are all east of the round house?
A. Yes sir.
Q. And all west of the water crane, except,——
A. North east of the water crane. You see the ash pit is directly

east of the water crane, and when you leave the ash pit, you go directly into the house.

Q. So that right there in the vicinity of the ash pit, and the water crane and the coal chutes there were at least five engines?

A. No, I do not believe there were five, there might have been four.

Q. All steamed up?

A. Yes sir.

Q. Was there any steam and smoke being omitted from them?

A. Possibly some smoke, and some steam due to the cold weather.

Q. Now while you were right there at the Orton engine, Mr. Huxoll was struck by the switch engine wasn't he?

A. Well I could not state positively but from all indications he was, yes sir.

Q. Well, when did you first hear that he was hurt, where *you were?*

A. *It* was on the ground at the head end of 1913.

Q. Right at Orton's engine?

A. Yes sir.

Q. What did you do then?

A. I met Mr. Dupont then there.

Q. Where did you go then?

A. Where did I go?

Q. Yes sir?

A. He told me that Huxoll was under that engine 213.

Q. What did you do then?

219 A. I went to the office first.

Q. Didn't you go to see whether or not he was there?

A. I saw his arm.

Q. Well, you saw that he was under there?

A. I saw someone was there,—I saw an arm under there.

Q. Well, that afterwards developed that Mr. Huxoll was under the engine?

A. Yes sir.

Q. Well, you went right directly to that place from the Orton engine?

A. Yes sir.

Q. Then you must have been right there at the Orton engine when he was struck?

A. I was in the Orton engine when he was struck.

Q. Now did you hear this switch engine pass?

A. No sir.

Q. Did you see it pass?

A. No sir.

Q. Or hear any sound of it at all?

A. No sir.

Cross-examination.

By Mr. Strode:

Q. What were you doing at the time the engine passed if you know?

A. Why all the time I was in the engine, I was putting on the right injector.

Q. What injector?

A. The right one.

Q. What is that?

A. That is a part of the engine that is used for taking the water out of the tank and putting it into the boiler.

Q. Where is it on the engine with reference to the cab windows?

A. It is immediately outside of the cab windows just ahead of the cab, and the levers extend just inside the cab, so that it is in
220 between the end of the boiler head and the front side of the cab.

Q. Which side of the engine were you on?

A. The north side.

Q. So that you were in behind the engine and this engine came along on the track to the south of it.

A. Yes sir.

Q. On this blue print is what appears to be what you might take for an engine right opposite what is shown to be the water crane, headed west?

A. Yes sir.

Q. And then one east of that?

A. Yes sir.

Q. Headed west with a little space between?

A. Yes sir.

Q. Now were there any other engines on this spot track at that time?

A. No sir.

Q. These two engines was all?

A. Yes sir.

Q. Now where was this—this one furtherest west on this spot track, was that the engine you have referred to as the Orton engine?

A. Yes sir.

Q. Where do you put the water in?

A. At the rear end of the tender.

Q. So that the rear end of this tender was opposite the water crane?

A. Yes sir.

Q. And you were putting water in there when you first took that engine back.

A. No sir, I did not put it in the tank.

Q. You didn't have anything to do with that?

A. I helped turn the crane was all.

Q. Where did you pull the crane?

221 A. There is a lever on the bottom that lifts up, and sometimes you pull it from the top. The lever on the bottom is about that long, (Indicating,) and that swings it around.

Q. Where do you do that, do you turn the water crane from the top, by taking hold of the water spout, or do you get down?

A. There was a man on top of the tank, and I was on the ground and I helped him turn the water crane.

Q. Where were you on the water crane, on the platform?
A. Yes sir. The lever is on the west side of the crane, and I lifted it up and it is about three feet from the bottom, where it is connected, and I pulled it around to the south,—the lever,—and I put the spouts to the north.
Q. And had the water spout been used on the south side, or which way does it extend?
A. It stands directly, practically east and west when it is normal.
Q. Which way do you use the pipe?
A. We always stand it east and west, when it is not used.
Q. Well, which way does it usually stand, to the west or the east side?
A. To the east side.
Q. And it had to be swung around from the east to the north?
A. It stood there to this side, and they had to swing it around that way.
Q. And you did that from the platform,——
A. Right at the base of the stand pipe.
Q. Did you notice what the condition around the water crane was at that time?

Mr. Comstock: The plaintiff objects to that question as improper cross examination, and immaterial, and incompetent.
(Question withdrawn.)

Q. Now the other engines that you refer to as being around here in this neighborhood, they were over on the tracks that are shown running through the cinder pit?
222 A. This one, and the next one down. (Indicating.)
Q. That is the one that runs on the coal chute?
A. It is on the south side of the coal chute.
Q. That is a division point, isn't it?
A. Yes sir.
Q. How many engines are usually housed in that round house there?
A. How many engines do we have there?
Q. Yes sir?
A. Well, we generally have from 15 to 20 engines at Sidney all the time.
Q. And how many engines usually are out on the tracks here that are in use or ready for use, or in ordinary condition?
A. All the way from two to 12.
Q. All the time?
A. Yes sir, going in and coming out of the house.
Q. Engines are passing back and forth all the time?
A. Yes sir.
Q. It is a busy yard?
A. Yes sir.
A. Now as I understand you, after you had helped get the water crane turned around to put water in the tender, then you went to

the front of the engine, and went to fixing something on the north side of the engine?

A. Yes sir.

Q. And didn't you notice another engine around?

A. No sir.

Q. Do you recall now hearing any engines at all while you were at work there?

A. No sir.

Q. Here or anywhere?

223 A. No sir.

Q. They could have run the engine almost anywhere over you, and you would not have heard it probably?

Mr. Rose: The plaintiff objects to that question as argumentative, and calling for the conclusion of the witness.

Sustained. Exception.

Q. Well around the yards where you are working, you do not become accustomed to the use of engines so that you can't hear them?

Mr. Rose: The plaintiff objects to that question as argumentative and calling for the conclusion of the witness, and as improper cross examination.

Sustained. Exception.

Q. Had you gotten out of the cab before you learned about the Huxoll accident?

A. Yes sir.

Q. And then you must have,—which side of the cab did you get out of, on the south side?

A. The south side.

Q. If Mr. Huxoll was taken out from under this engine at a point 72 feet from the water crane, you must have been probably near the point?

A. I was in the pilot of 1913, between the engine and the tank.

Q. And when you got out of the cab there between the engine and tank, on this 1913, which stood so that the water could be put into the tender, at the back end of the water crane, as I understand you, the pilot of Mr. Zimmer's engine was about opposite you?

A. No the pilots were about together.

Q. Then whom did you see there first?

A. I met Dupont the first man.

Q. Was he coming towards you, or were you going toward him?

A. When I saw him, I was walking towards the west.

Q. You were going up along here, and you saw him?

A. Yes sir.

224 Q. Was he running towards you?

A. Well, he -tood two or three steps it seemed to me from the south, and he said "Huxoll is under that engine."

Q. Do you think that he had come out from behind the engine,—was he on the track, do you think, or had run around the engine

A. No sir, he must have been standing on the north side of the engine 213, just about where Huxoll was.
Q. He ran up there afterwards and told you something about it did he?
A. Yes sir.
Q. You then probably were how far from where Mr. Huxoll was under the engine?
A. I was about 10 or 15 feet, and maybe twenty feet, when he told me.
Q. When he told you?
A. Yes sir.
Q. And did you look over there?
A. I said "where" and he pointed over there, and I walked over and saw his arm.
Q. Over the rail and under the wheel?
A. Yes sir.
Q. Then you went to the office?
A. Yes sir.
Q. What did you go to the office for?

Mr. Comstock: The plaintiff objects to that question as not proper cross examination.
Overruled. Exception.

A. I went to the office and sent the collector for a doctor.
Q. Well I asked you what you went there for?
A. I went there for assistance.
Q. To help Mr. Huxoll out?
A. Yes sir.

Mr. Comstock: We will concede that.

225 Redirect examination.

By Mr. Comstock:

Q. You are the foreman of the mechanical department?
A. Yes sir.
Q. Now, will you tell the jury, Mr. Nicholson, how far the pilot beam or the portion of an engine that extends furthest over the rail, extends out over the rail, the distance in feet and inches?
A. I didn't get your question.
Q. There is a part of an engine isn't there, Mr. Nicholson, that extends out beyond the outer edge of the railroad rails?
A. Yes sir.
Q. The wheels run on the rails?
A. Yes sir.
Q. Now there are parts of it that extend out beyond the rails?
A. Yes sir.
Q. Now tell the jury,—does the pilot beam extend the furthest out?
A. Well, the pilot beam is just about as far as any part of it, Mr. Comstock.
Q. Then the cab is just about equal distance?

A. Yes sir.

Q. Now will you tell the jury how far the pilot beam of engine 1913 extended outside of the rail?

A. Well, I could not state exactly, but it is in the neighborhood of about 2 feet and three to five inches.

Q. Two feet and three to five inches?

A. Yes sir.

Q. And the cab extends just about an equal distance?

A. Just about the same.

Q. And is that true of the Huxoll engine also, that stood there,—just about the same construction?

A. Yes sir.

Q. Now is there not Mr. Nicholson, along the side of these engines the steam chest, that really,—in which operate the piston heads, which is outside the rails also?

226 A. Yes sir, on most engines there are.

Q. Well were there on those?

A. Yes sir.

Q. And sometimes there is an exhaust, isn't there in the vicinity of these steam chests?

A. Yes sir, when they are running.

Q. Well don't they sometimes when they stand,—isn't there a little steam escaping over those sometimes?

A. Once in a great while, if the throttle is leaking, there is water coming out of the cylinder cocks.

Q. Well isn't there sometimes steam coming out of the drain cocks in the bottom of the cylinder?

A. When they are open also.

Q. And isn't there sometimes hot water coming out?

A. No sir, just after you shut it off is all.

Q. Now, can you tell the jury just how far the steam chest and these stop cocks or whatever you call them, extend out over the rail?

A. Well, the drain cocks are probably 12 inches outside of the rail, and the cylinders are just about the same as the pilot beams Two and a half feet.

Q. And the cylinders are awfully hot when the engine is steamed up?

A. No, they get cold when the engine is standing still.

Q. Or when the engine is moving, or has just stopped, they are pretty warm?

A. Well, there is a temperature of about three, or four or five hundred degrees.

Q. Well, that is pretty hot?

A. Well, that is inside of the cylinder, but there is a jacket outside of the cylinder, and it is never so warm but what you can lay your bare hand on the outside of it. Well there is a jacket on the steam chest too,—there is a jacket on all of that to keep the steam from going through the iron, and going through,——

227 Q. Well, I want to get the knowledge from you, you are the mechanical man?

A. You can generally put your hand on any part of the steam chest or cylinders.

Q. What are the cylinders?

A. That is the part in which the pistons move. The steam chest is where the valve is.

Q. And that sometimes leaks and some water comes out?

A. No sir, not out of the steam chest.

Q. Where does water come from?

A. The drain cocks.

Q. And they extend about the same distance outside of the pilot beam?

A. No sir, they are only about a foot outside of the rail.

Q. Now, I think on cross examination, you said something about a lever, that was a new one too? A lever on this water crane?

A. Yes sir.

Q. How long is that lever?

A. About three and one half feet.

Q. And is that attached to this big upright pipe?

A. Yes sir, to the column.

Q. And with that lever you turn that pipe back and forth?

A. Yes sir.

Q. And when that lever is turned to the east it sticks out how many feet east of the pipe?

A. It does not stick out unless you hold it, it falls down. You see it is connected on a hinge about this height, and when you want it you have to reach down and get it, and when you get through with it, it falls down.

Q. How do you keep it up?

A. You have to hold it up.

228 Q. There is no way of blocking it up?

A. No sir.

Q. How far does it stick up when it is hanging down?

A. It is against the pipe as close to it as you can get to it.

Q. Well, how close is that?

A. It is as close as you can get it.

Q. How far does it stick out?

A. Only the thickness of the lever.

Q. How far is that?

A. Only a half an inch.

Q. And isn't it only a half an inch where the hinge is?

A. That is all,—it may be three quarters of an inch thick, where the hinge is.

Q. How is it fastened on to this upright?

A. With a hinge.

Q. Just explain what kind of a hinge?

A. There is a hole in it, and the lever is about two or two and a quarter inches wide. And it is put in there with a pin through it.

Q. Well there has to be a band or something around,——

A. Yes sir there is a band there with these two projections having the holes in it.

Q. And how far do they project?

A. They may project an inch.

Q. And when the lever is raised it extends out from the crane how many feet?

A. About three or three and a half feet.

Q. And you have to lift the lever up to put it in that position so that it extends out three or three and a half feet and you have to lift it up in order to get it in that position?

A. Yes sir.

Q. And then when you quit using it it has to go back to its original position?

A. It falls down by its own weight.

229 Q. Which way does that lever extend,—towards the east, west or north or south?

A. It is located opposite of what we call the goose-neck, or the spout on the water drane, and the goose neck always stands to the east when we are not using the crane.

Q. So that that three and one half feet when the lever is up extends back to the west, unless you turn the crane around?

A. Yes sir.

Q. But there is a half inch there that is taken off at all times,—that is the distance between these two tracks,—the main line track and the spot track, is twelve feet at the water crane?

A. Yes sir.

Q. I do not know whether or not you made the measurements?

A. No sir.

Q. The water crane sits in the middle of that 12 feet?

A. Yes sir.

Q. Now there is a half an inch taken off by the strip that comes up along side of the stand pipe?

A. Well in place of making the stand pipe a twelve inch pipe on the inside, it will probably be twelve and a quarter inches on the inside.

Q. The matter of the extent out over the rail by the pilot of the engine, or any of the cylinders or air chambers or any thing connected with the engine, I think you said was two feet and a half, about?

A. About two feet and three to five inches.

Q. That is shown in this picture, about the way it is?

A. Yes sir.

By Mr. Strode:

Q. Exhibit five shows the pilot of the engine, doesn't it, at the end there?

A. Yes sir.

Q. And the air cylinder that Judge Comstock talks about,——

A. That is the cylinder and that is the valve.

230 Q. At the front end?

A. Yes sir.

Q. Down here,——

Mr. Comstock: The plaintiff objects to that question as improper cross examination,——

(No ruling.)

Q. Now what was the air chamber that he talked about, or did he finally conclude that was the cylinder?

A. That is it.

Q. Now does the cylinder or the air reservoir of the engine,—what is this on here?

A. That is the air pump.

Q. Do any of those extend any further out than the pilot beam?

A. No, the pilot beam is about the widest.

Q. Does this picture show the cylinder, and the air reservoir and the air pump, and other things on the side of the engine and the point of the pilot beam?

A. Yes sir.

Q. Shows the track,—I mean one track?

A. One rail.

Q. So that you can see the nature of it?

A. Yes sir.

Mr. Strode: As a part of the cross examination of this witness, the defendant offers in evidence Exhibit Number 5.

Mr. Comstock: The plaintiff objects to the offer of exhibit 5, as improper cross examination, if he wants to offer it, he can present it in the orderly course.

Sustained. Exception.

By Mr. Comstock:

Q. Did I understand you, Mr. Nicholson, that when this lever was turned to turn the goose-neck, that it was on the opposite side of the crane, as the goose neck?

231 A. Yes sir.

Q. So that when you were watering the Orton engine, when you turned the lever to turn the goose-neck, to the north, to let the water into Orton's engine, the lever then extended to the east?

A. On the south.

Q. Then it is not on the opposite side?

A. The lever turns with the goose-neck.

Q. Isn't the gooseneck the thing that puts the water into the engine?

A. Yes sir.

Q. Well, I understood you to say when it turned, your lever, was on the opposite side of the goose neck?

A. Yes sir, it is always opposite the goose neck.

Q. Well, the goose-neck was out towards the north?

A. When you are taking water.

Q. Then the lever was on the south side?

A. That is what I said.

Q. Well, I guess I didn't understand you. We didn't understand each other.

By Mr. Strode:

Q. The purpose of this lever is to turn the goose neck around to the right point?
A. Yes sir.
Q. To connect with the tender?
A. Yes sir.
Q. And you did that yourself?
A. Yes sir.
Q. Now, when the goose neck is turned around so that it comes to the right point on the tender, then what did you do with the lever?
A. Let it drop.
Q. What do you do with this lever?
A. Let it drop.
Q. Where did you go then?
232 A. Into the cab of engine 1913.

By Mr. Comstock:

Q. Is that an iron lever?
A. Yes sir.
Q. With an iron handle on it?
A. Yes sir.
Q. Is the pipe iron?
A. Yes sir.

Witness excused.

Mr. Comstock: The plaintiff offers in evidence Exhibit 6, being the stipulation.

No objection.

Exhibit 6 received in evidence without objection, and read to the court and jury, and a copy of the same, or the original is hereto attached and made a part hereof.

Mr. Comstock: The plaintiff now offers to read in evidence the deposition of B. R. Fletcher,—well before that we ask the defendant's counsel to stipulate the stipulation at the beginning with reference to the Interstate character of the freight train, or the freight on this train at Perdue that he was called to go out after, referred to in this stipulation.

Mr. Strode: Yes sir, that is all right.

Mr. Comstock: Now, the plaintiff offers to read in evidence the deposition of B. R. Fletcher.

(The deposition, minus those parts omitted, together with all objections and rulings of the court, as read to the jury, as follows:)

B. R. FLETCHER, of lawful age, being by me first duly examined, cautioned and solemnly sworn as hereinafter certified, de-
233 poseth and sayeth as follows:

Direct examination by Walter V. Hoagland:

Q. Where do you reside, Mr. Fletcher?
A. North Platte, Nebraska.
Q. What is your occupation?

A. Freight conductor for Union Pacific.
Q. How long have you been freight conductor for the Union Pacific?
A. Four and a half years.
Q. And on what division do you work?
A. Principally on the third district, Nebraska Division.
Q. Between North Platte and Sidney, Nebraska?
A. Yes sir.
Q. Were you acquainted with Fred Huxoll during his life time?
A. Yes sir.
Q. Were you freight conductor between North Platte and Sidney, Nebraska, working for the Company on January 1st, 1911?
A. Yes sir.
Q. Where were you on the morning of January 1, 1911?
A. Sidney, Nebraska.
Q. What was Fred Huxoll's occupation at that time?
A. Engineer.
Q. For what Company?
A. Union Pacific Railroad.
Q. And working between North Platte and Sidney, Nebraska?

Defendant's counsel objects because incompetent, calling for conclusion of witness and no proper foundation laid.
Overruled. Exception.

A. Yes sir.
Q. How long had you known Mr. Huxoll prior to January 1st, 1911?
A. About 6 years.
Q. Do you know what Mr. Huxoll's occupation was during the time that you knew him, and several years prior to January 1st, 1911?
234 A. He was in the engine service working with me part of the time.
Q. And for what Company?
A. Union Pacific Railroad Company.
Q. Were you called at Sidney, Nebraska, by the Union Pacific Railroad Company on the morning of January 1, 1911, for service?

Defendant's counsel objects as calling for the conclusion of the witness, incompetent, no foundation being laid, leading and suggestive, and not shown that the witness is qualified to testify on the subject.
Overruled. Exception.

A. Yes sir.
Q. Who called you?
A. Union Pacific call boy.
Q. At Sidney, Nebraska?
A. Yes.
Q. What time were you called?
A. I was called for 11:10 but don't remember what time I was called.
Q. What time were you called for?

Defendant's counsel objects as incompetent, calling for the conclusion of the witness, no foundation being laid, and is too general.
Overruled. Exception.

A. Call boy called me to pick up train.

Defendant's counsel moves to strike out answer of witness because incompetent, stating conclusion of the witness, no foundation has been laid for it, and is hearsay.
(No ruling) (No answer)

Q. Do you know what the process is in the calling of men for service on the road?
A. I know what the rule is.
Q. What is the rule?

235 Defendant's counsel objects as incompetent, no proper foundation being laid for it, not showing witness is qualified to testify on subject, not the best evidence and is hearsay.
Sustained. Exception.
Q. From whom do you receive these instructions?

Defendant's counsel objects as incompetent, hearsay, no proper foundation being laid for it, not showing witness is qualified to testify on subject, something not shown.
Overruled. Exception.

A. Instructions are received from the chief dispatcher where we get our orders.
Q. I refer to the instructions as to how long you are to be called in advance to going out?

Defendant's counsel objects as incompetent, irrelevant and immaterial, calling for the conclusion of the witness, no proper foundation being laid, not shwon that witness knows and hearsay.
Sustained. Exception.

Q. What rule or article of your train schedule is that found?

Defendant's counsel objects as incompetent, irrelevant and immaterial, calling for secondary evidence, no proper foundation has been laid for it, hearsay, the witness not qualified to answer on the subject?
Sustained. Exception.

Q. Now I hand you this schedule and I will ask you to examine it and state what rule or article it is?

Defendant's counsel objects as incompetent, irrelevant and immaterial, assuming something not shown or proven and for the further reason that it calls for secondary evidence, no proper foundation being laid for it and witness not qualified to testify on the subject.
Overruled. Exception.
A. Article 6 section 1.

236 Defendant's counsel moves to strike out last answer of the witness as incompetent, not the best evidence, no proper foundation has been laid for it and for the further reasons that the witness is not qualified to testify on the subject and is hearsay.
Overruled. Exception.

Q. When you were called on the morning of January 1, 1911, for train service at Sidney, Nebraska, what instructions, if any were given you by the call boy?

Defendant's counsel objects as incompetent, irrelevant and immaterial, assuming something not testified to, or proven and calling for hearsay evidence.
Overruled. Exception.

A. He called me to go to *perdu* and pick up a train and run to Sidney.

Defendant's counsel moves to strike out last answer of witness as incompetent, stating conclusion of witness, no proper foundation has been laid for it, and is hearsay.
Overruled. Exception.

Q. Was that instruction oral?

Defendant's counsel objects as incompetent, calling for hearsay evidence and no proper foundations been laid for it.
Overruled. Exception.

A. Yes.
Q. After you were called, did you report for duty that morning to go to Perdu?

Defendant's counsel objects as incompetent, calling for the conclusion of the witness, and no proper foundation has been laid.
Overruled. Exception.

A. Yes sir.
Q. Where did you report?
A. At the office, Telegraph office.
Q. At Sidney, Nebraska?
A. Yes sir.
237 Q. Did you receive any orders for this service?

Defendant's counsel objects—incompetent, calling for the conclusion of the witness, no proper foundation laid, hearsay.
Overruled. Exception.

A. Yes sir.
Q. From whom did you receive the orders?

Mr. Pettis: The defendant objects and excepts to the question as immaterial, and irrelevant.
Overruled. Exception.

A. Operator.
Q. At Sidney, Nebraska.
A. Yes sir.
Q. When did you receive these orders?
A. I will have to get my train book.
Q. Have you a book upon which you made memorandum at that time with reference to the services then performed and about to be performed?
A. Yes sir.
Q. You have that book now?

A. Yes sir.

Q. Can you testify to the facts by refreshing your memory from that book?

A. Yes sir.

Q. When did you receive the order?

Mr. Pettise: The defendant objects and excepts to that question as immaterial, and irrelevant.

Overruled. Exception.

A. As near as I can tell you about 2 o'clock P. M.

Q. When did you first report for orders?

Mr. Pettis: The defendant objects to that question for the reason that it is immaterial, and irrelevant.

Overruled. Exception.

A. About 10·40.

238 Q. Where did you report?

A. Telegraph office.

Q. What if any instructions did you get at the Telegraph office at that time?

Defendant's counsel objects as incompetent, irrelevant and immaterial, no proper foundation has been laid for it, calling for hearsay testimony and assuming that he received any instructions at that time.

(Objection withdrawn.)

A. I didn't receive any instructions until I got my orders.

Q. You may state who were the members of the crew who were to go out with you that morning, if you know?

Defendant's counsel objects as incompetent, calling for the conclusion of the witness, not shown that the witness knows or is qualified to testify on the subject, and calling for hearsay evidence.

Mr. Pettis: And the additional objection that it is immaterial and irrelevant.

Overruled. Exception.

A. E. C. Lambert and Charles L. Stingley, two brakemen.

Q. Do you know the engine crew who were to go out?

Defendant's counsel objects—as calling for conclusion of the witness, incompetent, hearsay, no proper foundation laid for it, and assuming.

Overruled. Exception.

A. Not positively at that time.

Q. At what time do you refer?

A. At the time I was called.

Q. Did you learn afterwards or after you were called who the engine crew were?

Defendant's counsel objects as incompetent, irrelevant, and immaterial, calling for hearsay evidence and no proper founda-

239 tion has been laid for it.

Sustained. Exception.

Q. That is the train register at the Telegraph office at Sidney, Nebraska?

A. Yes sir.

Q. When was it that you ascertained the names of the engine crew who were called to go out with you at 11 o'clock to Perdu?

Defendant's counsel objects as incompetent, irrelevant and immaterial, assuming something not testified to and the further reason that it calls for hearsay and secondary evidence and no proper foundation has been laid for it.

Overruled. Exception.

A. When I reported at the office for duty.

Q. And that was about 10:40?

A. Yes sir.

Q. Who did you learn at that time was the engine crew?

Defendant's counsel objects as incompetent, irrelevant and immaterial, calling for conclusion of witness and for hearsay evidence and for secondary evidence, the proper foundation has not been laid for it, and not calling for the best evidence.

Sustained. Exception.

Q. Do you mean by Huxoll, Fred Huxoll and by Orten, Thomas Orten?

Defendant's counsel objects as incompetent, irrelevant and immaterial, calling for conclusion of witness and not the best evidence, secondary evidence and no proper foundation has been laid for it and calling for hearsay evidence.

Sustained. Exception.

Q. Did you ever see Huxoll and Orten sign the train register before this time?

Defendant's counsel objects as incompetent, irrelevant and immaterial, assuming, calling for secondary evidence and not the best evidence and no proper foundation has been laid for it.

240 Sustained. Exception.

A. Yes sir.

Q. Did you know their hand writing?

A. I can't say.

Q. Were there any other engineers on the third division, Nebraska Division of the Union Pacific by the name of Orten, other than the engineer Thomas Orten?

A. Not to my knowledge.

Q. Were there any other engineers at that time working for the Union Pacific on the third division of Nebraska, by the name of Huxoll other than Fred Huxoll?

A. Not to my knowledge.

Q. Did you know practically all of the engineers that were working at that time on that division?

A. Practically, all, yes.

Q. Now, Mr. Fletcher, what books do the Union Pacific Railroad

Company keep at the terminal at Sidney for the purpose of showing the employment of the men,—of the engineers and conductors, where they go, and what their service is?

Defendant's counsel objects as incompetent, calling for the conclusion of the witness and as assuming and not shown that this witness is qualified to testify on the subject.

Sustained. Exception.

Q. How long have you worked as conductor for the Union Pacific?

A. About four and a half years.

Q. What service for the Company, if any, were you in before that time?

A. Brakeman.

Q. How long?

A. Commenced in 1903.

Q. Since 1903?

A. Yes sir.

Q. For the third division in Nebraska?

A. Yes sir.

241 Q. Now in this train register that is kept at Sidney, what men registered at that register?

Defendant's counsel objects as incompetent, irrelevant, and immaterial, calling for secondary and not the best evidence, no proper foundation being laid for it, calling for the conclusion of the witness and hearsay.

Sustained. Exception.

Q. What did you then do?

A. I went down to the round house to see of the engines were ready.

Q. Did you have any other conversation with the operator before you went down there, other then what you just testified to?

A. Not that I remember of.

Q. What did you do at the round house?

Defendant's counsel object to that question as incompetent, irrelevant and immaterial.

Sustained. Exception.

Q. Did you afterwards get your orders to go out and get this train?

Defendant's counsel objects as incompetent, irrelevant, and immaterial, calling for the opinion and conclusion of the witness, for secondary and not the best evidence, no proper foundation being laid for it and hearsay.

Sustained. Exception.

Mr. Hoagland: (During the trial.) We offer the answer to this question.

A. Yes sir.

Q. When was it that you got the orders?

Defendant's counsel objects as incompetent, irrelevant and immaterial, calling for hearsay, and for not the best evidence, and for secondary evidence and no proper foundation has been laid for it.

242 Sustained. Exception.

Mr. Hoagland: (During the trial.) We offer the answer to the question.

A. About 2 o'clock as near as I can say.

Defendant's counsel moves to strike out the last answer of the witness because incompetent, irrelevant and immaterial, hearsay secondary and not the best evidence, and no proper foundation has been laid for it.

Sustained. Exception.

Q. From whom did you receive the orders?

Defendant's counsel objects to the question as assuming, incompetent, irrelevant and immaterial, hearsay and not the best evidence, and no proper foundation has been laid for it.

Sustained. Exception.

Mr. Hoagland: (During the trial.) Plaintiff offers the answer to the question.

A. Operator at Sidney.

Defendant's counsel moves to strike out the answer to the witness, because incompetent, irrelevant and immaterial, hearsay, secondary and not the best evidence and stating a conclusion of the witness.

Sustained. Exception.

Q. What was the name of the operator?

A. I cannot say positively which operator gave them to me, there *are* at least two operators working there at the time with Mr. Simons.

Q. Who were the other operators working there?

A. I could not say.

Q. Were the orders in writing?

A. Yes.

Q. Have you got the orders which were given you at that time?

A. No sir.

Q. What did you do with them?

243 A. Don't preserve our orders,—never preserve them.

Q. What do you do with the orders after you get through with them?

A. Usually throw them away.

Q. Did you throw this away?

A. Yes.

Q. You may state what those orders contained?

Defendant's counsel objects as incompetent, irrelevant and immaterial, calling for hearsay and not the best evidence, secondary evidence, and no foundation being laid for it.

Overruled. Exception.

A. I can't say what the order was myself, I do not remember it.
Q. State the instructions as near as you can remember it?

Defendant's counsel objects as incompertent, irrelevant and immaterial, calling for hearsay and secondary and not the best evidence, no proper foundation has been laid for it.

Sustained. Exception.

Mr. Hoagland: (During the trial) Plaintiff offers the answer to this question.

A. My book shows I had an order to return engine 1913 Sidney to Perdu and return to Sidney.

Defendant's counsel moves to strike out the answer of the witness as incompetent, irrelevant and immaterial as hearsay and secondary evidence and not the best evidence and no proper foundation having been laid for it.

Sustained. Exception.

Mr. Hoagland: (During the trial) We want to offer all of his deposition with reference to his going out of Sidney, that day, and coming back, and the conditons of the yards at Sidney at that time.

Mr. Strode: We will stipulate that he went out as the conductor with the two engines,—in charge of two engines as conductor going down to Perdu to bring in this train.

Mr. Hoagland: We will eliminate then all of the deposition from here to 135, inclusive,—question 135, in view of Mr. Strode's
244 stipulation.

Q. Where were you at the time of the Fred Huxoll accident?
A. I was in the Sidney Telegraph office.
Q. Was that the time you referred to in your previous examination as being in the telegraph office?
A. Yes sir.
Q. And you went from there to the round house?
A. Yes sir.
Q. What was the temperature at Sidney, Nebraska, at that time?
A. I could not say exactly,—I am not positive?
Q. How cold was it?
A. Wuite cold,—at least ten degrees below zero.
Q. What was the condition of the yards at that time, as to steam?
A. Well, there were places where the steam was quite bad.
Q. Did you see Huxoll there?
A. Yes sir.
Q. Did you go down to the engine where the accident occurred?
A. Yes sir.
Q. What was the condition of the steam and yards at that place?
A. The steam was quite bad.
Q. How extensive a territory did the steam cover?
A. I should say about 100 to 200 feet.
Q. How dense?
A. It was quite dense.
Q. What do you mean by quite dense?
A. I hardly know how to describe it.

Q. How far could you see?
A. A man could not see over two or three feet?

Moves to strike out the answer to the question for the reason it is not responsive.
Overruled. Exception.

245 Q. Did you know where the Huxoll and Orten engines were at that time?
A. No sir.
Q. Where was Huxoll when you saw him?
A. Under engine 213.
Q. What was engine No. 213, a regular switch engine or a road engine?

Defendant's counsel objects to the question as immaterial.
Overruled. Exception.

A. Road engine.
Q. How *colse* was it to the water crane, where you saw Huxoll under the engine.
A. I am not prepared to say,—I didn't notice it.
Q. East of it?
A. Yes sir.
Q. Now when you came into the yards in the afternoon from the east with this train from Perdu, what was the condition of the steam and the yards there at that time and about the water crane, as compared with the condition in the morning?

Mr. Pettis: The defendant objects to that question as immaterial, the time referred to therein being subsequent to the happening of the alleged accident, and it is irrelevant.
Overruled. Exception.

A. About the same.
Q. Did you come through that steam with the train?
A. No not with the train.
Q. Did you go thru with an engine?
A. Yes.
Q. What engine?
A. Both engines,—1913 and 1909.
246 Q. Who was in charge of the crew and engine?

Mr. Pettis: The defendant objects to that question as immaterial, and calling for the conclusion of the witness.
Sustained. Exception.
Mr. Hoagland: (At the trial) The plaintiff offers the answer to the question.

A. I was in charge of the crew.
Q. What if any precaution did you take?

Mr. Pettis: The defendant objects to that question as immaterial.
Sustained. Exception.
Mr. Hoagland: (At the trial) The plaintiff offers the answer to the question.

A. I used a fuzee and brakeman walked side of track through the steam ahead to prevent any train or engine coming against us.

Q. As I understand it, you flagged ahead?

Mr. Pettis: The defendant objects to that question as immaterial, and relating to a time subsequent to that of the happening of the alleged accident, and to the actions of no party to this suit, nor of parties intestate, immaterial irrelevant and incompetent, leading, and calling for the conclusion of the witness.

Overruled. Exception.

Mr. Strode: (At the trial) The defendant objects to the question further as incompetent, and not within the issues here, and an attempt to show an act of Mr. Fletcher in going through this steam under different conditions, and for different purposes than the use of that track at the place of that accident by the switchman and his crew, and that subsequent acts on the part of Mr. Fletcher or of his company, would be incompetent, under any issue of this case, as tending to prove the acts of negligence, alleged against this company.

Sustained. Exception.

Q. Did you go through the steam in the Sidney yards at
247 any other time during January 1, 1911 other than the time you testified to with an engine?

A. Yes sir.

Q. What other time?

A. I started out of Sidney yards for Perdu about 2:35.

Q. (Number 160) What if any precautions were taken with refer ence to the ringing of the bell on the engine?

Mr. Pettis: The defendant objects to that question as immateria irrelevant and relating to a time subsequent to the happening o the alleged accident, and to the actions of no party to this suit, no of parties intestate, and immaterial irrelevant and incompetent leading, and calling for the conclusion of the witness.

Sustained. Exception.

Mr. Hoagland: (At the trial.) The Plaintiff offers the answer t the question.

A. I had the engineer ring the bell and blow the whistle.

Mr. Pettis: The defendant moves to strike out the answer of th witness as immaterial, relating to a time subsequent to that of th nappening of the alleged accident, and to the actions of no party t this suit nor of parties intestate, and immaterial, irrelevant and i incompetent, leading and calling for the conclusion of the witnes

Sustained. Exception.

Mr. Hoagland: (At the trial.) To the question number 159, "A I understand it, you flagged ahead?" to which objection was su tained, the plaintiff offers the answer.

A. Yes sir.

Defendants move to strike out the answer of the witness as i material, relating to a time subsequent to that of the happening the alleged accident, and to the actions of no party to this su

not of parties intestate, and immaterial, irrelevant and in-
248 competent, leading and calling for the conclusion of the witness.

Sustained. Exception.

A. (Number 163) What if any precautions were taken at that time by the crew in going through the steam?

Defendant objects to that question as immaterial, relating to a time subsequent to that of the happening of the accident, and to the actions of no party to this suit, nor of parties intestate, and immaterial, irrelevant and incompetent, leading, and calling for the conclusion of the witness.

Overruled. Exception.

A. Flagged through same as before.

Defendant objects to the answer and moves to strike it out as immaterial, and relating to a time subsequent, to that of the happening of the alleged accident, and to the actions of no party to this suit, nor of parties intestate, immaterial, irrelevant and incompetent, leading, and calling for the conclusion of the witness.

Overruled. Exception.

Q. What precautions were taken as to the ringing of the bell and blowing of the whistle?

Defendant objects to the question as immaterial, and relating to a time subsequent to that of the happening of the alleged accident, and to the actions of no party to this suit, nor of parties intestate, immaterial, irrelevant and incompetent, leading and calling for the conclusion of the witness.

Sustained. Exception.

Mr. Hoagland: (At the trial) The plaintiff offers the answer to the question:

A. Rang the bell and blew the whistle.

Q. What experience have you had in handling trains through steam and stormy weather such as this was, during the time you have been working for the railroad company, both as brakeman and conductor?

249 A. Well I don't think I was ever before up against such a bad storm and steam.

Defendant moves to strike out the answer as not responsive.

Sustained. Exception.

Mr. Hoagland: (At the trial) We offer the answer.

Q. You may state what kind of a storm was at Sidney at the time of the Huxoll accident?

A. Wind blowing hard, great deal of frost and some snow.

Q. From which way was the wind blowing?

A. Principally from the north.

Q. Was that about the severest storm as they usually have?

A. Yes sir.

Q. In going through that steam there, with an engine, how far ahead could the track be seen to be clear by the engineer in his cab?

Defendant's counsel objects to the question as leading and calling for the conclusion of the witness and no foundation laid, and no knowledge shown by the witness.

Overruled. Exception.

A. Could not be seen at all.

Q. You may state whether or not the precautions which you took in going through the steam and storm at this time in the Sidney yards, were the usual precautions taken by the Union Pacific employees?

Defendant's counsel objects to that question as leading and suggestive, calling for a conclusion of the witness, no foundation laid, and no knowledge shown by the witness.

Overruled. Exception.

A. Well, the instructions,—I can't say what other people do.

Defendant's counsel moves to strike out that part of the answer as follows "Well that is instructions" as not responsive to the question.

Overruled. Exception.

250 Q. These were the ordinary precautions which you observed in going through places like that?

Defendant's counsel objects to that question as leading and suggestive and calling for the conclusion of the witness, no foundation laid, and refers to a time subsequent to the happening of the accident complained of, and immaterial, irrelevant and incompetent.

Overruled. Exception.

A. Yes sir.

Q. Handing you plaintiff's exhibit 6, Mr. Fletcher, I will ask you to state if that is a duplicate of a train order issued by the Union Pacific on January 1, 1911.

Defendant's counsel objects to that question as no foundation laid, and no knowledge shown by the witness, immaterial, and irrelevant, calling for the conclusion of the witness, and assumes facts not proven, and incompetent.

Mr. Hoagland: (At the trial) The plaintiff offers the answer to the question.

A. Yes sir.

Q. You may state whether or not you saw an order like that on that day?

Defendant's counsel objects to that question as no foundation laid, and no knowledge shown by the witness, and immaterial and irrelevant, calling for the conclusion of the witness, *asn* assumes facts not proven and incompetent.

Sustained. Exception.

Mr. Hoagland: (At the trial) The plaintiff offers in evidence the answer to the question.

A. Yes sir.
Q. Where?

Defendant's counsel objects to that question as no foundation laid, and no knowledge shown by the witness, and immaterial
251 and irrelevant, calling for the conclusion of the witness, and assumes facts not proven and incompetent.
Sustained. Exception.

Mr. Hoagland: (At the trial.) The plaintiff offers in evidence the answer to the question.
A. I received one at Sidney, Nebraska.
Q. Just like that?

Defendant's counsel objects to that question as no foundation laid, and no knowledge shown by the witness, and immaterial and irrelevant, calling for the conclusion of the witness, and assumes facts not proven and incompetent.
Sustained. Exception.
Mr. Hoagland: (At the trial) The plaintiff offers in evidence the answer.

A. Yes, to the best of my knowledge.
Q. From whom did you receive it?

Defendant's counsel objects to that question as no foundation laid, and no knowledge shown by the witness, and immaterial and irrelevant, calling for the conclusion of the witness, and assumes facts not proven, and incompetent.
Sustained. Exception.
Mr. Hoagland: (At the trial.) The plaintiff offers in evidence the answer.

A. Operator.
Q. About what time of day?

Defendant's counsel objects to that question as immaterial.
Sustained. Exception.
Mr. Hoagland: (At the trial.) The plaintiff offers in evidence the answer to the question.

A. About the time I got my orders,—about two o'clock I should judge.

Q. That is a copy then of an order which was delivered to
252 the train men by the operator at Sidney on that date?

Defendant's counsel objects to that question as no foundation laid, and no knowledge shown by the witness, and immaterial and irrelevant, calling for the conclusion of the witness, and assumes facts not proven and incompetent.
Sustained. Exception.
Mr. Hoagland: (At the trial.) The plaintiff offers in evidence the answer to the question, as given in the deposition.

A. As it looks to me, yes.

(This was all the deposition offered at the trial of this case, the last time.)

(Signed) B. R. FLETCHER.

It now being 12 o'clock Noon, October 16th, 1913, court adjourned to meet at two o'clock P. M. the same day.

Two o'clock P. M. October 16th, 1913, Court met pursuant to adjournment, and the following proceedings were had and done.

Mr. Strode: It is stipulated that Mr. Matthews is not now within the jurisdiction of this court, or the reach of a subpœna from this court. It is further stipulated by the parties that when the case was adjourned last May, that Mr. Matthews promised the plaintiff that he would addend court as a witness upon any further trial, whenever the plaintiff called upon him, and that in Sidney about two weeks ago, on the 27th day of September, the witness Matthews personally promised the plaintiff's attorney, W. V. Hoagland, at Sidney, Nebraska, to attend the trial of this case which was at that time intended to commence on October 6th. That afterwards the attorney for plaintiff, Mr. Hoagland, advised the witness that
253 the case was set for the 13th, and he again promised to be present here, and in pursuance of that promise, Mr. Hoagland, as attorney for plaintiff, advanced him ten dollars in money to pay his traveling expenses to Lincoln, and promised to advance other necessary expenses for his maintenance and engaged a room for him at the Lindell Hotel in this city in expectztion of his promise to be here. During the trial, and on this date, plaintiff's attorney Hoagland was advised that the witness had returned the ten dollars advanced him by letter, dated October 16th, from Sidney to Mr. Hoagland's office in North Platte. It is further stipulated that on yesterday, after learning the fact that the witness Matthews had started from Sidney, with the ostensible purpose of being here, a subpœna was issued to the sheriff of this county, and the sheriff after diligent search was unable to find hom in this county.

It is further stipulated that it was first discovered on yesterday afternoon by counsel for the plaintiff, and counsel for the defendant, that the witness Matthews had not reported to this court, and was not within the jurisdiction of the court, so far as counsel were advised, and upon that situation being developed, counsel for the defendant company engaged the services of the sheriff of Lancaster County, the Chief of Police of the City of Lincoln, and the sheriff of Chevenne County, the county, in which Sidney is situated, and the police department of the City of Omaha, for the purpose of locating this witness Matthews, and for the purpose of having him brought into the jurisdiction of this court, and that in such efferts. to locate the witness, counsel for the plaintiff joined to the extent of sending a man to Sidney, from North Platte, and a general search was made for this man Matthews by both plaintiff and defendant, and that the result was that he was located at Sidney, or in the neighborhood of Sidney, at the home of his father-in-law last night,

about 9 o'clock, by the sheriff of Cheyenne County, who at
254 the time was acting upon the request of counsel for the defendant, and that the sheriff at once advised counsel for the defendant, that this witness Matthews was located and that counsel for the defendant at once advised counsel for the plaintiff, with a view of taking some joint action to bring this witness back into the jurisdiction of the court, and that upon being advised that this witness would not return to the jurisdiction of the court, unless brought here by warrant, counsel for plaintiff and defendant were unable to find a method of bringing him within the jurisdiction of the court.

Mr. Strode: I would also like to have the record show that so far as the absence of this witness, and his failure to be here at this time, to testify upon behalf of the plaintiff, that counsel for both the plaintiff and the defendant, stipulate that both parties have acted in the utmost good faith, and have done all that could be done to secure his presence here.

Mr. Rose: I will stipulate to that.

Mr. Strode: The witness C. B. Matthews, mentioned in the foregoing stipulation, was present at the trial of this case, in May, 1913 in this court, and was duly sworn as a witness and testified orally, and his evidence was taken stenographically by the reporter of this court and transcribed.

CALVIN A. EMERY, sworn as a witness on behalf of the plaintiff was first duly sworn and testified as follows upon examination:

By Mr. Rose:

Q. What is your name?

A. Calvin A. Emery.

Q. Are you the official court reporter of this court?

A. Yes sir.

Q. Did you report the former trial in this court, in May, 1913, that was continued?

255 A. Yes sir.

Q. Was the witness Charles B. Matthews sworn as a witness upon that trial?

A. He was.

Q. Did he testify both on direct and cross examination?

A. He did.

Q. Did you take at the time, a true stenographic report of his testimony?

A. I did.

Q. And do you have now your original stenographic notes containing the testimony which he gave on both direct examination and cross examination at that trial?

A. I have.

Q. Did you make a correct transcript of that for the purpose of being embodied in the bill of exceptions?

A. I did.

Q. Is that transcript now before you, bearing the filing mark of the clerk of the district court, and the certificate of the present judge,

who is now presiding in this court, the transcript of his evidence beginning at page 25?

Mr. Strode: The defendant objects to that question as immaterial irrelevant and incompetent, and no proper or sufficient foundation laid.

Overruled. Exception.

Mr. Rose: The plaintiff now offers in evidence in connection with proof of service,—we first offer the proof of service of this transcript, the return thereof, and the certificates of the allowance bearing the signature of the judge of this court, of which we ask the court to take judicial knowledge, and the filing mark, and certificate of the clerk of the district court, showing it is the original bill of exceptions.

Mr. Strode: The defendant objects to that offer as immaterial, and incompetent.

256 Overruled. Exception.

Received in evidence, and a copy of the same here follows:

(*Copy of Offer.*)

I, J. S. Baer, clerk of the district court of Lancaster County, within the third judicial district of Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of said clerk in said cause, In testimony whereof I hereunto set my hand, and affix the official seal of said court, this 26 day of September, 1913.

J. S. BAER,
Clerk District Court.

Received of plaintiff, for examination and amendment, a draft of a bill of exceptions in the following case of Ella Huxoll, Adm'x, plaintiff, vs. Union Pacific Railroad Co., defendant, tried in the district court of Lancaster County, at the April, 1913, term.

Dated Aug. 18th, 1913.

____ ____

Attorneys for Defendant.

(Attached to the sheet upon which was the foregoing certificate of the clerk, etc. inserted into the original bill of exceptions by the Reporter, was a sheet, a copy of which here follows:)

Union Pacific Railroad Company.

N. H. Loomis, General Solicitor.
Edsom Rich, Assistant General Solicitor.
Messrs. Stout & Rose, Attorneys, Omaha, Nebr.

OMAHA, NEBR., Sept. 25, 1913.

257 Gentlemen: At the request of Mr. John Stout, I am writing this letter to say that on the 18th day of August, 1913, there was served upon the Union Pacific Railroad Company, a purported transcript of all stenographic notes taken at Lincoln during

the trial of the case of Ella Huxoll, Adm'x, vs. Union Pacific Railroad Company, together with copies of exhibits introduced on said trial, the transcript referred to bearing the certification on page 369 thereof of Clavin A. Emery, reporter.

Yours very truly,

EDSON RICH.

— herewith return the draft of the bill of exceptions in the case of Ella Huxoll, Adm'x, plaintiff, vs. Union Pacific Railroad Company, defendant, sub*in*tted on the — day of ——, 19—, and propose amendments thereto as follows:

Dated, —— —, 19—.

——— ———,
Attorney for Defendant.

(The following written in pen and ink at the bottom of the same page).

Received the annexed proposed bill of exceptions returned to us by Mr. Edson Rich, Attorney for defendant, Sept. 17, 1913.

STOUT, ROSE & WELLS,
Attorneys for Pl't'ff.

(Following is a copy of the certificate of allowance.)

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Adm'x, Plaintiff,
vs.
UNION PACIFIC RAILROAD CO., Defendant.

258 And the Plaintiff, in the above entitled cause, in the district court of Lancaster County, third judicial district of Nebraska, having within the time heretofore allowed by the court for that purpose, red*u*ced to writing, in this her bill of exceptions, all of the testimony and evidence adduced or offered on both sides of the before named cause, in the before named court, all of the objections, with the grounds therefor, made to the admission of testimony and evidence, all of the rulings of court on such objections, and all of the exceptions to such rulings made and taken at the time and having served the same on the attorneys for the above named defendant, according to law, for examination and amendment; and the said bill of exceptions being now herebefore me the undersigned judge, before whom said cause was tried, on motion of the attorneys for the plaintiff that the same may be settled, allowed, signed, sealed, and made a part of the record in said cause in the said court.

Now I, the said judge, do hereby certify that this bill of exceptions contains all of the testimony and evidence adduced or offered by the plaintiff and defendant on the trial of said cause, all of the objections to the admission of testimony, all of the rulings of the court, on such

objections, and all of the exceptions taken to such rulings at the time, and I do hereby order that it be made a part of the said record in the said couse in the said court.

No amendments tendered by either plaintiff or defendant. Done at Lincoln, Nebraska, this 26th day of September, 1913.

P. JAS. COSGRAVE, *Judge.*

Mr. Rose: We now offer in evidence from this transcript beginning at page 25, the testimony of the witness Charles B. Matthews, both on direct examination and cross examination, given at the former trial of this case in the month of May, 1913.

Mr. Strode: The defendant objects to that offer as incompetent, and no proper and sufficient foundation laid, and not the best evidence.

259 Sustained. Exception.

Mr. Strode: I would like to examine the witness:

The Court: All right.

By Mr. Strode:

Q. Do you think you can read your notes at this time?

A. I know I can read my notes.

Q. Did you transcribe this testimony of Mr. Matthews?

A. I did. I dictated some of it on the phonograph.

Q. And trusted to other people to get it off?

A. Yes sir.

Q. Have you examined it, Mr. Emery, this testimony that was written out, and compared it?

A. Why I looked it over at the time I delivered a copy of the daily transcript to Mr. Pettis, and *chedked* it as to typographical errors, but as to the correctness of the transcript as compared with the original notes, I could not say exactly.

Q. If you were permitted to read this transcript of the testimony, Mr. Emery, will you before the case is submitted to the jury, check it over against your notes to determine whether it is accurate in all respects?

A. Yes sir.

Q. And if it is not, report it back here, and make such corrections as should be made in it?

A. Yes sir.

(Witness excused.)

(The Witness was excused for the purpose of going to his residence and there obtaining the notes in the former case, at which time, during his absence a recess was taken.)

Reporter returns with the notes.

260 Mr. Strode: The defendant objects to the reading of the testimony of the witness Matthews, in view of the situation stipulated, above, with reference to the witness Matthews being on the train with a road master Johnson, of the Union Pacific, as far as Valparaiso, and leaving the train at that point, and apparently disappearing at that point; such testimony remaining in the record.

And in view of that testimony, and the inferences to be drawn from it, the question of why the witness Matthews did not report to the court during the course of this trial, and why he disappeared at Valparaiso having become an important factor in the trial of the case, and in the matter of the credibility of his testimony, and his standing before the court as a witness, counsel object to the use of his testimony, on condition that he use all his testimony, and in connection with this objection offer to pay all expenses for counsel for the plaintiff to go to North Platte with counsel for defendant, and take the deposition of the witness Matthews, in this case, on the merits of the case, and upon the question of why the witness Matthews did not report here as a witness, or counsel agree that the case may be continued until such deposition can be secured or counsel offer to pay the expenses and send one of the counsel for defendant along with one or more counsel for the plaintiff, and have the testimony or deposition of Matthews taken, and the trial proceed in the charge of either counsel here in this case, during the time such deposition is taken, all for the purpose of getting before the court and the jury, the reasons why Mr. Matthews didn't appear in court, and why he returned to Sidney, and why he returned the money paid him by plaintiff for his expenses here, all to be considered by the court and jury in weighing his testimony.

The Court: The court being fully advised in the premises and officially informed by the sheriff of Lancaster County, that said witness Matthews has not been since the commencement of
261 this trial, and is not now a resident of Lancaster County, Nebraska, or a resident of the Third Judicial District of the State of Nebraska, the objection is overruled. Exception.

Mr. Strode: It will be understood that the same objections that appear in this testimony, appear as the objections made now, and the same rulings made then unless changed by the court will be the rulings now.

The Court: Yes sir.

It now being 5:30 P. M. October 16th, 1913, court adjourned to meet at 9:30 A. M. the following morning, October 17th, 1913.

9:30 A. M. October 17th, 1913, Court met pursuant to adjournment, and the following proceedings were had and done.

C. A. EMERY, recalled as a witness on behalf of the plaintiff, read as follows from the testimony of Charles B. Matthews, given in the former trial of this case, as contained in his stenographic notes taken at said trial.

(Read as follows.)

CHARLES B. MATTHEWS, called as a witness on behalf of the plaintiff, was first duly sworn and testified as follows, upon examination,

By Mr. Comstock:

Q. What is your full name?
A. Charles B. Matthews.

Q. What is your age?
A. 30 years.
Q. What was your occupation on the first day of January, 1911?
A. Extra fireman for the Union Pacific.
Q. And where was your place of labor?
A. Sidney, Nebraska.
Q. You say engineer for the Union Pacific?
A. Fireman, I said.
262 Q. Oh, fireman,—what kind of a fireman?
A. Locomotive fireman.
Q. On the first day of January, 1911, what particular service were you engaged in?
A. I was firing the switch engine.
Q. Where?
A. At Sidney.
Q. Do you remember the number of the engine you were firing?
A. Yes sir.
Q. State the number?
A. 213.
Q. Who was the engineer operating this engine on that day?
A. Roscoe Zimmer.
Q. How long Mr. Matthews had you been in the employ of the Union Pacific Railroad, before the first day of January, 1911?
A. I could not state for sure, 4 or 5 months.
Q. During the period you have mentioned, where were you located,—at what place were you located or working?
A. At what place was I working?
Q. Yes sir?
A. I was working as extra fireman at Sidney.
Q. At Sidney?
A. Yes sir.
Q. All this time?
A. Yes sir.
Q. Were you on the first day of January, 1911, familiar with the situation of the yards at Sidney of the defendant?
A. Yes sir.
Q. Were you familiar with the location of its main line track and various switch tracks there?
A. Yes sir.
Q. Were you familiar on that day with the engines used
263 by the defendant both in operating trains upon the road, and in the yards for switching?
A. Yes sir.
Q. What kind of an engine was this number 213,—was it a switch engine or a road engine?
A. It was a,——

Mr. Pettis: The defendant objects to that question as immaterial, and leading and suggestive.
Overruled. Exception.

A. A road engine.

Q. When Mr Matthews, did you begin work on the first day of January, 1911?
A. At what hour?
Q. Yes sir?
A. At six o'clock.
Q. In the forenoon or afternoon?
A. In the forenoon.
Q. Can you describe to the jury the general construction of the switch engine, ordinarily and generally used in the Sidney yards on the first day of January, 1911, for switching purposes?

Mr. Pettis: The defendant objects to that question as immaterial and assuming facts not proven.
The Court: Answer "Yes" or "No." Exception.

A. Yes sir.
Q. Describe the general construction of such and engine?

Mr. Pettis: The defendant objects to that question as immaterial.
Overruled. Exception.

A. A regular switch engine is smaller,——

264 Mr. Pettis: The defendant moves to strike out that part of the answer so far given as not responsive.
Overruled. Exception.

A. Smaller in size, a low tender, and a foot board on each side of it.
Q. What about lights or lamps if any on it?
A. There were two headlights on it?
Q. Where are they placed?
A. One in front and one back.
Q. Now just describe generally to the jury what you mean by foot board?
A. Why a foot board is for the purpose of the switchman,——

Mr. Pettis: The defendant objects to that and moves to strike it out as not responsive.
Mr. Comstock: That may be stricken out.

Q. What I desire you to speak concerning particularly, Mr. Matthews, is the location of this attachment you call a footboard. Just tell the jury where it is, and about how it is made and on what part of the engine it is placed?
A. Why it is placed on the front of the engine,—there is one foot board about, I should judge, a foot from the ground, and one in the back the same way.
Q. How do they extend,—lengthwise or cross wise of the tracks?
A. Cross wise of the track.
Q. And what is the fact with reference to whether or not they extend along the whole rear and front end of the engine?
A. They do.
Q. State to the jury whether or not the engine number 213 was equipped with foot boards?

Mr. Pettis: The defendant objects to that question as immaterial.
Overruled. Exception.

265 A. It was not.

Q. State whether or not it had foot boards on either end?

Mr. Pettis: The defendant objects to that question as immaterial.
Overruled. Exception.

A. It did not.

Q. Were you Mr. Matthews, on the first day of January, 1911, acquainted with the custom and practice of operating switch engines in the yards of the Union Pacific Railroad at Sidney, Nebraska?

A. Yes sir.

Mr. Pettis: The defendant objects to that question as assuming and leading and suggestive and immaterial.
Overruled. Exception.

Q. Were you on that day acquainted with the custom and practice in the Sidney yards of the Union Pacific Railroad with reference to having a switchman or other look out on the foot board of a switch engine while operating in the Sidney yards?

Mr. Pettis: The defendant objects to that question as dual, and assuming, and leading, incompetent, immaterial, and calling for the conclusion of the witness.
Overruled. Exception.

A. Yes sir.

Q. Now you may tell the jury what that custom was on that day in the particular of a switchman or look out on the foot board, Mr. Matthews?

Mr. Pettis: The defendant objects to that question as assuming facts not proven, incompetent, calling for the conclusion of the witness, leading and suggestive, and immaterial.
Overruled. Exception.

A. The custom is to have a switchman at the front end of the engine in the direction it is going.

266 Mr. Pettis: The defendant moves to strike out the answer of the witness as assuming facts not proven, incompetent, calling for his conclusion and leading, and suggestive, and immaterial. And not responsive.
Overruled. Exception.

Q. You use the word "is", the custom "is".

Mr. Pettis: The defendant objects to that question as assuming facts not proven, incompetent, calling for the conclusion of the witness, leading and suggestive and immaterial.
Overruled. Exception.

A. Why, it was at that time.

Mr. Pettis: The defendant moves to strike out the answer of the witness as assuming facts not proven, incompetent, a conclusion of

the witness, and immaterial, and answered in response to a leading and suggestive question.
Overruled. Exception.

Q. Now, just explain that custom Mr. Matthews to the jury so they will understand it as applicable to whether you are backing up or going ahead with your engine?

Mr. Pettis: The defendant objects to that question as assuming and leading and suggestive, and calling for the conclusion of the witness, and immaterial, irrelevant and incompetent.
Overruled. Exception.

A. I do not understand?
Q. (Question read.)
A. I do not understand.
Q. Sometimes your engine backs up in switching?
A. Yes sir.
Q. And sometimes they proceed with the front end ahead?
A. Yes sir.
Q. And now then just tell the jury about what the custom is when you are backing up or when you are going ahead whether it applies equally both ways?

267 Mr. Pettis: The defendant objects to that question as assuming and leading and suggestive and calling for the conclusion of the witness, and immaterial, irrelevant and incompetent, and leading.
Overruled. Exception.

A. If you are backing up, the switchman is supposed to be on the back end.

Mr. Pettis: The defendant moves to strike out the answer of the witness as not respo-sive and not the statement of a fact.
Overruled. Exception.

Q. You have reference in speaking of that custom to the time that Mr. Huxoll was killed, do you?
Mr. Pettis: The defendant objects to that question as leading and suggestive and immaterial, irrelevant and incompetent.
Overruled. Exception.

A. Yes sir.
Q. What kind of a day was the first of January, 1911, at Sidney so far as the weather and elements were concerned?
A. It was cold and stormy.
Q. Do you know what the temperature was in fact?
A. No sir.
Q. And what kind of a storm was prevailing?
A. A snow storm.
Q. Do you remember the condition of the yards at Sidney on the first day of January, 1911, in reference to whether or not there was smoke or steam, in any great quantities there?
A. Yes sir.

Q. Now tell the jury whether there was or was not, just describe it in reference to steam and smoke, the condition of the yards at that date?

A. Well, there was steam and smoke.

268 Q. Now tell the jury how dense it was, or otherwise,—whether it was dense, or otherwise, and if dense, how dense?

A. It was dense at times so that you could not see.

Q. Were you on the first day of January, 1911, familiar with the location of the water crane in the defendant's yards at Sidney, Nebraska?

A. Yes sir.

Q. Do you know whether or not on that day and at the time that Mr. Huxoll was injured, there was any ice about this water crane?

A. Yes sir.

Q. Now tell the jury whether there was or was not ice about the water crane at that time?

Mr. Pettis: The defendant objects to that question as immaterial. Overruled. Exception.

A. There was.

Q. In what quantities,—how much, and what area was covered with it?

A. I could not state,—it was all around the water crane.

Q. Do you know Mr. Matthews, the condition of the brakes and braking appliance of this engine, Number 213, at the time Mr. Huxoll was injured?

A. Yes sir.

Q. State to the jury what the condition of the brakes and braking appliance on that engine was at the time Mr. Huxoll was killed?

Mr. Strode: Objects as immaterial, irrelevant and incompetent, and on an issue barred by the statute of limitations.

Overruled. Exception.

269 (The following is not contained in the notes of the reporter but is suggested by Mr. Strode, as the proceedings at the time.)

Mr. Strode: The defendant asks to be advised by counsel for the plaintiff at this time, as to whether it is their intention or purpose to make the amendment to their petition referred to in their motion and application, which was presented to the court sometime in November 1912, and upon which the court made an order allowing the plaintiff to make the amendment, set out in the motion, by interlineation, but which amendment has not in fact been made.

Mr. Comstock: We filed a motion setting out the amendment we desired to make in the motion. And the court by order allowed us to make the amendment. We supposed that the amendment was attached to the petition, and I am satisfied that it was, for I am sure I saw it pinned to the petition. However if it is not attached to the petition, we want permission to make the amendment at this time.

Mr. Rose: We ask leave of court to make this amendment as of

this time. It seems that the amendment is not attached to the petition.

Mr. Strode: There is no objection to plaintiff making the amendment as of this time. However we want permission to file an amendment to our answer, answering the matters brought into the petition by the amendment, and if the court will grant that permission, we will prepare and file this answer, instanter.

The Court: The plaintiff may make the amendment to their petition, as of this time, and the defendant may file an amended answer, or an amendment to the answer, anstanter.

A. It was not in working condition.

Mr. Pettis: The defendant moves to strike out the answer of the witness as a conclusion.

Overruled. Exception.

Q. Now tell the jury, Mr. Matthews, in what particular they were disabled, and what made them not in working condition, what was their real condition?

270 Mr. Pettis: The defendant objects to that question as a dual and triple question.

Mr. Comstock: You can strike out everything but what was their real condition.

The Court: I think it all leads to the same proposition, overruled. Exception.

Mr. Strode: Objects as immaterial, irrelevant and incompetent and on an ussue barred by the statute of limitations.

Overruled. Exception.

A. The air pump was not working and we could not use the brakes.

Q. What was the condition of the air, on this engine at the time Huxoll was hurt?

Mr. Strode: Objects as immaterial, irrelevant and incompetent and on an issue barred by the statute of limitations.

Overruled. Exception.

A. We had no air on the engine.

Q. How?

Mr. Strode: Objects as immaterial, irrelevant and incompetent and on an issue barred by the statute of limitations.

Overruled. Exception.

A. There was no air on the engine.

Q. What was the matter with the air?

Mr. Strode: Objects as immaterial, irrelevant and incompetent, and on an issue barred by the statute of limitations.

Overruled. Exception.

A. Air pipes was froze.

Q. How is the air produced on an engine?

Mr. Strode: Objects as immaterial, irrelevant and incompetent, and on an issue barred by the statute of limitations.

Overruled. Exception.

271 A. I cannot explain that because I never had experience enough on that.

Q. Well, is it pumped in by the operation of steam or how?

Mr. Pettis: The defendant objects to that question as leading and suggestive, and coaching his own witness, and the witness having answered that he cannot explain and he is not sufficiently familiar.

Q. Do you know how it is obtained, and applied on an engine?

Mr. Strode: Objects as immaterial, irrelevant and incompetent, and on an issue barred by the statute of limitations.

Overruled. Exception.

Mr. Pettis: The defendant objects to that question as leading and suggestive, and coaching his own witness and the witness has answered that he cannot explain, and he is not sufficiently familiar.

Overruled. Exception.

A. Yes sir.

Q. Now you may tell the jury:

Mr. Pettis: The defendant objects to that question as leading and suggestive, and coaching his own witness and the witness having answered that he cannot explain and he is not sufficiently familiar.

Overruled. Exception.

Mr. Strode: Objects as immaterial, irrelevant and incompetent, and on an issue barred by the statute of limitations.

Overruled. Exception.

A. I could not say how it is,—it is applied by the lever in the cab.

Q. Now what was the condition of this engine number 213, at the time Mr. Huxoll was injured, in reference to whether or not the bell was in condition to be used and operated?

272 Mr. Pettis: The defendant objects to that question as leading and suggestive.

Overruled. Exception.

Mr. Strode: Objects as immaterial, irrelevant, and incompetent and barred by the statute of limitations.

Overruled. Exception.

A. It was not.

Q. What was the matter with that?

Mr. Strode: Objects as immaterial, irrelevant and incompetent and on an issue barred by the statute of limitations.

Overruled. Exception.

A. The bell cord was broke in two, and I could not ring the bell from the cab. And the automatic steam bell was not in working condition.

Q. What was the matter with the automatic steam bell?

Mr. Pettis: The defendant objects to that question as there being no foundation laid, and leading and immaterial.

Overruled. Exception.

Mr. Strode: Objects as immaterial, irrelevant and incompetent, and on an issue barred by the statute of limitations.
Overruled. Exception.

A. It was froze.
Q. When did you first discover, Mr. Matthews, that the automatic valve to control the bell was frozen?

Mr. Strode: Objects as immaterial, irrelevant and incompetent on an issue barred by the statute of limitations.
Overruled. Exception.

A. I could not state exactly, it was sometime that morning.
Q. Could you approximate the time, or how long it was before Mr. Huxoll was injured?

Mr. Strode: Objects as immaterial irrelevant and incompetent, and on an issue barred by the statute of limitations.
Overruled. Exception.
273 Mr. Pettis: The defendant objects to that question as assuming.
Sustained. Exception.

Q. What time of the day did you first begin to fire this engine on the first day of January, 1911?
A. About 6 o'clock.
Q. In the morning?
A. Yes sir.
Q. Now what was the condition then, with reference to the automatic steam valve that controlled the bell?

Mr. Pettis: The defendant objects to that question as assuming. Now the point is there, that there was no testimony in this record that shows this was a valve. Withdrawn.

Q. What was frozen on this engine, Mr. Matthews, that prevented your using air to control brakes and the bell?

Mr. Strode: Objects as immaterial irrelevant and incompetent, and on an issue barred by the statute of limitations.
Overruled. Exception.
Mr. Pettis: The defendant objects to that question as assuming and calling for the conclusion of the witness and leading and suggestive.
Overruled. Exception.

A. The air pump was frozen.
Q. Now what is the air pump?

Mr. Pettis: The defendant objects to that question as no foundation laid. Overruled. Exception.
Mr. Pettis: And no knowledge shown, and the witness already has said he was not familiar with the air.
Overruled. Exception.
Mr. Strode: Objects as immaterial, irrelevant and incompetent and on an issue barred by the statute of limitations.
Overruled. Exception.

274 A. The air pump supplies the air to apply the air to the brakes.

Q. What runs the pump?

Mr. Strode: Defendent objects to the question as immaterial irrelevant and incompetent and on an issue barred by the statute of limitations.

Overruled. Exception.

A. Steam.

Q. Where does the steam come from?

Mr. Strode: Objects as immaterial irrelevant and incompetent and on an issue barred by the statute of limitations.

Overruled. Exception.

A. It comes from the engine.

Q. What appliance if any, is there on this engine, or was there on this engine, to stop it when it was in motion? Otherwise than the air brakes that you said were out of order?

Mr. Strode: Defendant objects as immaterial irrelevant and incompetent and barred by the statute of limitations.

Overruled. Exceptions.

A. That engine.

Q. This 213, that you were working on, as fireman, on that day?

Mr. Pettis: The defendant objects to that question as immaterial, irrelevant and incompetent, and calling for the conclusion of the witness, and leading and assuming.

Overruled. Exception.

Mr. Pettis: The defendant objects to that question as immaterial irrelevant and incompetent, and calling for the conclusion of the witness, and leading and assuming. Overruled. Exception.

Mr. Strode: Objects as immaterial irrelevant and incompetent, and on an issue barred by the statute of limitations.

Overruled. Exception.

275 A. There wasn't any that I could see.

Q. (Last question read)

Mr. Strode: Objects as immaterial irrelevant and incompetent, and on an issue barred by the statute of limitations.

Overruled. Exception.

A. The lever,—the reverse lever was the only thing there was to stop it with.

Mr. Pettis: The defendant moves to strike out the answer of the witness after "The reverse lever" as not responsive.

Overruled. Exception.

Q. Mr. Matthews, do you remember the occurence of Mr. Huxoll being injured in the Sidney yards on the first day of January, 1911?

A. Yes sir.

Q. What if anything had the engine number 213, upon which you were then working as fireman, to do with this injury?

A. It ran over Mr. Huxoll.
Q. Were you riding upon it as fireman at the time it ran over him?
A. Yes sir.
Q. What other persons were upon this engine if any?
A. The engineer, Roscoe Zimmer.
Q. Were you proceeding forward, or backing up?
A. We were backing up.
Q. Was there, or wasn't there any person on the foot board of this engine to keep a look out?

Mr. Pettis: The defendant objects to that question as calling for the conclusion of the witness, and also assuming a fact, and immaterial and incompetent and irrelevant.
Overruled. Exception.
Mr. Strode: Objects as immaterial irrelevant and incompetent and barred by the statute of limitations.
Overruled. Exception.

276 A. There was not.
Q. Was the bell ringing at the time you struck Mr. Huxoll?

Mr. Pettis: The defendant objects to that question as calling for the conclusion of the witness, and assuming a fact not proven, and immaterial and incompetent.
Overruled. Exception.
Mr. Strode: Objects as immaterial irrelevant and incompetent and on an issue barred by the statute of limitations.
Overruled. Exception.

A. No sir.
Q. Where were you coming from, with this engine, at the time Mr. Huxoll was run down, from what part of the yards?

Mr. Strode: Objects as immaterial irrelevant and incompetent and on an issue barred by the statute of limitations.
Overruled. Exception.
A. We were coming from the east end of the yards at Sidney.
Q. And you were proceeding in what direction?
Mr. Strode: Objects as immaterial irrelevant and incompetent and on an issue barred by the statute of limitations:
Overruled. Exception.

A. West.
Q. Tell the jury whether or not the whistle of this engine was sounded from the time you started on this course that you were pursuing, when Huxoll was run down, or before you started, up to the time you struck Mr. Huxoll?

Mr. Strode: Objects as immaterial, irrelevant and incompetent, and on an issue barred by the statute of limitations.
Overruled. Exception.

A. No sir.
Q. Was it, or wasn't it sounded?

277 Mr. Strode: Objects as immaterial, irrelevant, and incompetent, and on an issue barred by the statute of limitations. Overruled. Exception.

A. It wasn't sounded.

Q. Tell the jury the condition of the weather and the elements at the time this Engine number 213 struck Mr. Huxoll?

A. The weather was cold and steam and smoke,——

Q. Now to what extent was there steam and smoke at the point and near the point where Mr. Huxoll was struck?

A. Why it was dense,—you could not see.

Q. How far could you see, Mr. Matthews?

A. I could not see,—oh, we could not see very far.

Q. How far could you see the track ahead of your engine?

A. We could not see it at all.

Q. How was it in reference to whether or not you could see your own engineer right across the cab at times?

A. Well, at times I could and at times I could not.

Q. How close is this water crane to the main line track in the Sidney yards?

A. About 6 or 8 feet.

Q. On what track was this engine 213, moving at the time it ran Mr. Huxoll down?

A. The main line track.

Q. Do you know, Mr. Matthews, whether or not there is any track just north of the water crane in the Sidney Yards?

A. Yes sir.

Q. Is there?

A. Yes sir.

Q. About how far north of this water crane is that track located?

A. About 6 or 8 feet.

Q. And do you know what that track is called, or was on the first day of January, 1911?

A. Yes sir.

Q. What did they call that track?

278 A. The spot track.

Q. Now do you know Mr. Matthews, at the time,—whether or not at the time Mr. Huxoll was run down by engine number 213 there was any engines standing on this spot track?

A. Yes sir.

Q. Now tell the jury as near as you can where they were located in reference to the water crane?

A. There was one right north of the water crane, on the north side, and there was one ahead of that one, and one behind it.

Q. Do you know Mr. Matthews, whether the window of the cab, was open or closed at the time Mr. Huxoll was run down.

A. Yes sir.

Q. Was it open or closed?

A. Closed.

Q. Do you know whether or not the blind,—or whether or not there was any blind over that window?

A. Over the window?

Q. Yes sir.
A. There was none.
Q. Do you know whether or not the window in the side of the cab, on the fireman's side, was open or closed at the time Huxoll was run down?
A. It was closed.
Q. Do you know Mr. Matthews, what the custom and practice was in the Sidney yards, of the Union Pacific Railroad in reference to having a man flag ahead or otherwise in foggy and smoky and steamy weather?

Mr. Pettis: The defendant objects to that question as assuming and leading and suggestive and calling for the conclusion of the witness.
The Court: Answer yes or no.

A. Yes sir.
Q. Now state to the jury what the custom and practice in the Sidney yards on the first day of January, 1911, was in reference
279 to flagging a switch engine through steam and smoke?

Mr. Pettis: The defendant objects to that question as dual in form and assuming and leading and suggestive, immaterial, irrelevant and incompetent, no foundation laid, and calling for the conclusion of the witness.
Overruled. Exception.

A. The custom was to have a switchman on the foot board on the front end of the engine in the direction it was going.

Mr. Pettis: The defendant objects to that question, or the answer, and moves to strike it out, as answered to a dual question, and assuming and answered to a leading and suggestive question, immaterial, irrelevant and incompetent, no foundation laid, and calling for the conclusion of the witness.
Overruled. Exception.

Q. Now, Mr. Matthews, what was the construction of this engine Number 213, in reference to the tank, whether it was a high or low tank,—whether it was the kind you described ordinarily attached to a switch engine, or otherwise?

Mr. Pettis: This last question is objected to by the defendant for the reason it is immaterial irrelevant and incompetent, and calling for the conclusion of the witness, and leading and assuming.
Overruled. Exception.

A. It was a high tank.
Q. Do you know about the rate of speed this engine was proceeding at the time it struck Mr. Huxoll?
A. Yes sir.
Q. You may state?

Mr. Pettis: The defendant objects to that question as immaterial.
Overruled. Exception.

A. About 8 or 10 miles an hour, more or less.

185

Q. When did you first discover that this engine had run over Mr. Huxoll?

A. When I heard somebody holler.

280 Q. Did you afterwards ascertain who hollered?

A. How is that?

Q. Did you afterwards learn who it was that hollered,—well, what did you do when you heard somebody holler?

A. I didn't do anything.

Q. Well, what did you say?

A. I do not remember of saying anything.

Q. Well did you get off of the engine after that?

A. I got off after we stopped.

Q. Now what did you discover when you stopped and you got, off,—just tell the jury what you found there,—and what you did then?

A. After we stopped I got off the engine and looked around and Mr. Huxoll was under the engine.

Q. Under what part of the engine?

A. He was under the driver and close to the ash pan, as near as I can remember.

Q. Was he alive or dead?

A. He was alive.

Q. And did you do anything to get him out from under there, Mr. Matthews?

A. No sir.

Q. Did anybody?

A. Yes sir.

Q. Now tell the jury what was done?

A. Well I did not see what they did.

Q. You did not stay to see what happened?

A. I didn't see how they took him out of there, is what I mean to say.

Q. Do you know how long they were in taking him out?

Mr. Pettis: The defendant objects to that question as immaterial. Overruled. Exception.

281 A. About 30 or 35 minutes.

Q. Do you know about the distance it was from the water crane to where Huxoll's body laid under the engine, when you stopped?

A. Yes sir.

Q. What distance was it?

A. It was about 75 or 80 feet.

Q. In which direction from the water crane?

A. West.

Q. Did you see the water crane as you passed it on the engine that day,—that you struck Huxoll?

A. No sir.

Q. Was there anything to obstruct your view of it?

A. Yes sir.

Q. What?

A. Steam and smoke.

Q. Do you know, Mr. Matthews, about the point where Mr. Huxoll was first struck, with this engine, in reference to the water crane?

A. I could not tell exactly where he was struck at,—it might have been right at the,——

Mr. Pettis: I object to that.——

Q. What is your recollection of where your engine was, when you heard someone holler. With reference to the water crane?

A. We were west of the water crane, when I first herard him holler.

Q. How far?

A. I could not say.

Q. Do you know about how far this engine ran after you heard somebody holler?

A. Yes sir.

Q. About how far?

A. About 30 or 40 feet.

Q. How long was this engine,—how many feet long?

A. I don't know.

282 Q. Mr. Matthews, before the time that Mr. Huxoll was injured, in the Sidney yards, had you ever taken any examination touching your qualifications?

A. Yes sir.

Q. Where?

A. Sidney.

Q. And were you ever given any general instructions in the customs and practices of the Union Pacific Railroad in the operation of iss trains and engines?

Mr. Pettis: The defendant objects to that question as assuming and calling for the conclusion of the witness and immaterial.

Overruled. Exception.

A. Yes sir.

Q. In the general method of the operation of trains generally by all railroads?

Mr. Pettis: The defendant objects to that question as leading and suggestive, incompetent and immaterial and irrelevant and everything else you can think of, and assuming.

The Court: All the railroads?

Mr. Comstock: I mean general principles of ra*il*roading.

Objection sustained. Exception.

Q. What have you done if anything Mr. Matthews, to familiarize yourself with the principles and rules of operating trains and engines generally by railroads?

Mr. Pettis: The defendant objects to that question as immaterial irrelevant and assuming.

Overruled. Exception.

Question withdrawn.

Q. Had you ever been instructed by the examining crew of the Union Pacific Railroad upon the operation of trains and engines generally?

283 Mr. Pettis: The defendant objects to that question as immaterial irrelevant and incompetent, and assuming ans no foundation laid.

Overruled. Exception.

A. Yes sir.

Q. And were you on the first day of January, 1911, familiar generally with the principles of railroading?

Mr. Pettis: The defendant objects to that question as leading and assuming and no foundation laid, and calling for the conclusion of the witness.

Overruled. Exception.

A. In my capacity I was.

Mr. Pettis: The defendant moves to strike out the answer as not responsive.

Overruled. Exception.

Q. That is in reference to the operations of trains and engines?

A. Yes sir.

Q. Now what was the general practice and custom in reference to flagging through smoke and steam, which was sufficiently dense to obscure the engine man's view of the track ahead?

Mr. Pettis: The defendant objects to that question as leading and suggestive, and calling for the conclusion of the witness and no foundation laid, and assuming facts not proven, and the witness not showing himself qualified.

Overruled. Exception.

Mr. Pettis: Add the objection that the question is dual in form.

Overruled. Exception.

284 A. The custom was to stop and send flagmen ahead.

Q. Did you hear anybody else holler there just at the time, or about the time you stopped?

A. Yes sir.

Q. Who?

A. Fireman Dupont.

Q. And where was he when you heard him speak?

A. I don't know where he was,—he just had his head into the cab of the engine.

Q. And what did he say?

A. He told us to stop that we had run over someone.

Q. Did he say who it was that you had run over?

A. Yes sir.

Q. State what he said in that particular?

A. He said "My engineer".

Q. Mr. Matthews, do you recollect whether or not the curtains or blinds in the back of the cab were open or closed at the time this engine ran Mr. Huxoll down?

A. Yes sir.

Q. Now state to the jury whether or not they were open or closed?

A. Closed.

Q. What kind of blinds were they?
A. It is a common piece of canvass that goes straight across the back of the cab.
Q. Could you see through it?
A. No sir.
285 Q. Calling your attention to Exhibit 2, I will ask you if that is the book of rules in force or whether it is or is not the book of rules of the Union Pacific Railroad Company in force on the first day of January, 1911?
A. Yes sir.
Q. Did this switch engine or didn't it stop at any time from the time you started from the east end of the yards, backing westward, until you ran over Mr. Huxoll?
A. No sir.

Cross-examination.

By Mr. Pettis:

Q. Where do you live?
A. Bitter Creek, Wyoming.
Q. What is your business now?
A. Working on a ranch.
Q. How long have you been out there?
A. About 13 months.
Q. How long had you been working as a fireman for the Union Pacific?
A. About 8 or 9 months.
Q. As a fireman?
A. Yes sir.
Q. How long had you been working as a hostler?
A. Well I could not state exactly the time,—I was called whenever they needed me there.
Q. Isn't it a fact that you worked for about 8 or 9 months as a hostler and about three months as a fireman?
A. No sir.
Q. Isn't it a fact that you began work for the Union Pacific as a fireman in the month of September, 1910?
286 A. Yes sir.
Q. Now at the time of the accident, you had been a fireman then about three or four months, three and a half, hadn't you?
A. Well, I do not remember the date or what year it was, that I went to work as a fireman.
Q. They took your deposition in this case out to Bitter Creek or Rock Springs last fall, didn't they?
A. Yes sir.
Q. At that time, did you not state that you went to work as a fireman, in September 1910, for the Union Pacific?
A. I might have stated, I do not remember.
Q. You began work on the day of this accident at 6 o'clock?
A. Yes sir.
Q. Who was your engineer?

A. Roscoe Zimmer.

Q. You were working in the yards at the time of this accident?

A. Yes sir.

Q. The place where the accident occurred is in the Sidney yards isn't it?

A. Yes sir.

Q. This water crane is used to water engines on both the main line track and the spot track?

A. Yes sir.

Q. You are familiar with the location of the tracks and turn table and round house, engineers' house, wash house, and the general location of the yards at Sidney, at that time?

A. Yes sir.

Q. Do you know,—assuming that a man started from the wash house,—the engineer's wash house, which was at the west end of the yards, wasn't it, it was west of the water crane?

287 A. Yes sir.

Q. And east of the hotel?

A. Yes sir.

Q. And assuming a man to start from that wash house to go on an engine which was on the spot track by the water crane, how wide a space did he have to walk in without crossing any track at all?

A. That depends on where you mean?

Q. He was going east to the water crane?

Mr. Comstock: The plaintiff objects to that question as uncertain and indefinite and not proper cross examination.

The Court: Make it more definite.

Q. Mr. Matthews, a person starting from the wash house in the Sidney yards, on the day this accident happened, and walking eastward, to get on an engine at the water crane, or near the water crane, the person walking being an engineer, who was to take out that engine, the engine being headed west, would he or would he not, have had a clear unobstructed by track, or other obstruction, path, on which to travel that distance and that direction at that time.

A. Yes sir.

Q. How was that?

A. Yes sir.

Q. Mr. Matthews, the main track at Sidney at that time was south of the water crane?

A. Yes sir.

Q. Now do you know how far north of the main line the turn table was or approximately how far?

A. I could not say positively,—it was 30 or 40 or maybe 50 feet.

Q. Now for a distance then of 30 or 40 or possibly 50 feet, there was a clear and hard beaten gravel path way wasn't there?

288 A. Yes sir.

Q. Running towards this water crane, and this engine which was spotted at the water crane,—that is, I mean the path led from the wash house towards the water crane?

A. Well it is not that wide, all the way down.

Q. The spot track ran from the turn table down to the water crane?

A. Yes sir, and passed the water crane.

Q. And east of the water crane there was a switch which ran from the spot track to the main line?

A. Yes sir.

Q. Now as we are going down to the water crane from the wash house, the spot track runs in closeer to the main line, doesn't it?

A. I did not get that.

Q. As you come, going from the wash house east, and as you approach and come near the water crane, the spot track runs in toward the main line, and narrows up that path way?

A. Yes sir.

Q. And the water crane is between the spot track and the main line?

A. Yes sir.

Q. Now then north of the spot track how near is the next track or how far from the spot track is the next track north?

A. About 30 or 35 feet.

Q. And upon those two tracks, or between those two tracks, a perfectly clear spot or path way,—between the spot track and the next track north?

A. Yes sir.

Q. Mr. Matthews, an engine headed west,—which would be the engineer's side of that engine, the north side or the south side, standing at the spot track?

289 A. The north side.

Q. So Mr. Huxoll, when he walked along the main line here at the time and place where he was headed, was going out of his way to get onto his engine standing there at the spot track, wasn't he?

A. I do not know.

Q. Well, he was to the south of his engine, wasn't he?

A. He was at the time he was struck.

Q. And he was outside of the path between the main line and the spot track wasn't he,—he wasn't in that path?

A. I could not say whether or not he was.

Q. Well, Mr. Matthews, where was he when he was hit?

A. Well, he was under the engine when I seen him.

Q. Where was he when he was hit?

A. Why he must have been in the main line.

Q. And so it was outside of this path between the two tracks?

A. Yes sir.

Q. And was south of his engine?

A. Yes sir.

Q. So that he had when he got up to his engine, to cross back and go north and go around his engine, to get on his side, didn't he?

A. He would if the engine was headed west.

Q. Had he gone straight east,—just south of the turn table, and north of the main track, he would have come right up against the

engine on the side where he belonged, wouldn't he, the engine being facing west?

A. Well I do not know whether he could have got across or not.

Q. Got across what?

290 A. To the north side of his engine.

Q. What would stop or prevent him getting across?

A. Well, there might have been engines there just the same as any other place.

Q. Is that all you can think of that would have stopped him?

A. Well, I do not think it was the custom to go around there.

Mr. Pettis: The defendant moves to strike out answer as not responsive. Overruled. Exception.

Q. Is that all you can think of that would have stopped him?

A. The turn table pit.

Q. Is that all?

A. That is all I know of.

Q. Now this turn table was as you say, 30 or 50 feet north of the north rail of the main line track?

A. More or less.

Q. And in that thirty to fifty feet, there was nothing to stop him, or obstruct his passage was there?

A. No sir.

Q. Now this spot track it ran from the turn table east, didn't it?

A. Yes sir.

Q. Now you say there were three engines there, you think now?

A. Yes sir.

Q. And you do not know how long an engine is?

A. Well there are different sizes of engines.

Q. Well take the longest one, the longest road engine you have out there, do you know how long it is?

A. No sir.

Q. Do you know how long the shortest one is?

A. No sir.

Q. What is the length of the spot track from the turn table to the water crane?

A. I do not know.

Q. In any event you are sure there were only three engines on the spot track at that time?

A. Yes sir.

291 Q. And one was west of the crane and one was at the crane, and one west?

A. Yes sir.

Q. And those three engines you say that were there, were all east of the turn table?

A. Yes sir.

Q. How near the turn table was the nearest one?

A. Well, I could not say.

Q. 100 or 200 feet?

A. About 40 or fifty feet I should judge.

Q. Do you think about 40 or 50 feet?

A. More or less.
Q. And in that 40 or 50 feet what was there to obstruct Mr. Huxoll's passage?
A. I do not know.
Q. Nothing?
A. I do not know.
Q. Well, what was your answer?
A. I said I did not know.
Q. Was there any ice there,—was there any water crane there in that 40 or 50 feet?
A. I never examined the track there.
Q. You don't know whether there was water crane there or not.
A. I know where the water crane was.
Q. That was within 40 or 50 feet of the turn table?
A. No, it is further than that.
Q. Now on this 40 or 50 feet, that you say was between the turn table and the nearest engine, was there any water crane there?
A. No sir.
Q. Now Mr. Matthews, again calling your attention to the taking of your deposition in Wyoming, at that time weren't you asked how many engines there were at the crane, or near there on the spot track, and did you not say that there was one you were sure of and there might have been two but no more?
292 A. I do not remember.
Q. Will you say you did not say so.
A. No, I can't say.
Q. What did you say, Mr. Matthews?
A. I said no.
Q. By that, you mean you did not so say, or you cannot remember now?
A. I say I could not remember.
Q. Now with reference to the steam and smoke, that was around the water crane, wasn't it?
A. Yes sir.
Q. It made a sort of a cloud there around the water crane, didn't it?
A. What do you mean by that?
Q. Don't you know what a cloud is?
A. A cloud of smoke, or what?
Q. A cloud of smoke and steam?
A. Yes sir.
Q. Now about how far east of the crane did that extend?
A. I could not say for sure,—probably 30 feet.
Q. About how far west?
A. As far west as the turn table.
Q. You think it went as far west as the turn table?
A. Yes sir.
Q. And about 30 feet east?
A. Yes sir.
Q. Now that was a pretty dense and thick cloud?
A. Yes sir.

Q. You could not see through it at all?

A. No sir.

293 Q. Occasionally the wind would shift and lift it up and blow it away?

A. Yes sir.

Q. Now that condition of smoke and steam was plainly to be seen by anybody walking from the depot or the wash house towards it?

A. Yes sir.

Q. And you could tell that, you could not see through it, a person could?

A. Yes sir.

Q. Now this condition of steam and smoke settling on the track around that water crane, was not an unusual condition there, the weather conditions being right, was it?

A. Yow was that.

Q. (Question read.)

A. Not in cold weather.

Q. In other words, in cold weather, you expected to find steam and smoke over the tracks and on the tracks at that point?

A. Yes sir.

Q. And that was a known condition to the men working in the Sidney yards?

A. Yes sir.

Q. Now this water that you say was around the water crane,—that came from the overflow of the water as it was being used to fill the engines?

A. Yes sir.

Q. And that was a known condition in the winter time around and near a water crane, and the water crane at the Sidney yards?

A. I do not know whether or not it was known.

Q. And didn't you expect to find a round the base of a water crane, and that particular crane, in the Sidney yards, in the winter time, more or less ice?

294 A. Yes sir.

Q. In cold weather?

A. Yes sir.

Q. And that was the usual condition at the base of that crane in the winter time, wasn't it, in cold weather?

A. Yes sir.

Q. And that was known to all the men and employees around the Sidney yards?

A. I do not know whether or not it was known to all of them or not.

Q. Well, you knew it?

A. Yes sir.

Q. Now you say this steam and smoke was so dense there that, at times you could not see the engineer in your own cab?

A. Yes sir.

Q. Will you tell the jury how a man on a foot board on the leading end of that engine could have seen any further than you could?

Mr. Comstock: The plaintiff objects to that question as calling for the conclusion of the witness wholly, and not calling for any fact, and not proper cross examination, and it is a conclusion ultimately submitted to the jury.

Sustained. Exception.

Q. Now Mr. Matthews, assuming that the dense steam and smoke was so dense there, that you could not see your engineer in your cab, do you think that a switchman on that foot board on the leading end of the engine could have seen any further than you could at that time?

A. I think he could, yes sir.

Q. You think he could have seen farther through the steam and smoke than you could have seen?

295 A. Yes sir.

Q. Why do you think he could have seen farther than you could have seen?

A. Why, he would be closer to the track than we were.

Q. But could he see,—do you think he could see any greater distance than you could see?

A. Well I do not know whether or not he could.

Q. Well, don't you know he could not?

A. I would not state.

Q. Now for a switchman being on the foot board to be of any value or service in stopping the engine, he would not only have to see something on the track, but also to signal to the engineer, wouldn't he?

A. Yes sir.

Q. About how long was the tank on that engine, 213?

A. Probably 12 or 15 feet.

Q. Wasn't it probably 30 feet?

A. It might have been *n*ore than that, I don't know.

Q. Now if the steam was so dense that you could not see across the cab, and see your engineer, do you think that a switchman thirty feet back of you or even 12 feet back of you could have seen or signaled the engineer so he could see the signal?

A. I don't know.

Q. You don't know?

A. No sir.

Q. You mean to tell the jury that you know the steam was so dense that you could not see across the cab, to see the engineer, but you do not know whether or not the switchman's signal to the engineer could be seen or not twelve feet off?

296 A. I said I did not know.

Q. Could you see a man on the foot board through that steam and smoke?

A. Not on engine 213 I could not.

Q. Could you have seen a man on the foot board on any engine through that steam and smoke?

A. No, I do not think I could.

Q. And it would be because of the steam and smoke that you could not see them?

A. Yes sir.

Q. Now the foot boards on the end of the engine there, frequently cut in two in the middle, don't they,—they don't run clear across the end of the engine?

A. The engine we had there, a regular switch engine at the Sidney yards, had them clear across.

Q. What was the number of that engine.

A. 1239.

Q. Now you swear that had foot boards running clear across?

A. Yes sir.

Q. You are positive they weren't cut in two? Under a coupler or a buffer?

A. They were not at that time.

Q. You are positive of that?

A. Yes sir.

Q. The engine you use had a place or steps at the back end of it, didn't it?

A. Yes sir.

Q. And it had a rod running across the back end of it, did it not, an iron rod?

A. Yes, sir.

297 Q. And it had steps in front of it too, didn't it?

A. In front of the engine?

Q. Yes sir, upoin the pilot end?

A. No.

Q. Are you sure about that?

A. Yes sir.

Q. Did it have a grab iron on the pilot end?

A. Yes sir.

Q. But it had no steps?

A. No sir.

Q. This engine at that time of the accident was running backward?

A. Yes sir.

Q. At the time of this accident you were on the engine,—the switch engine?

A. Yes sir.

Q. And Mr. Zimmer, the engineer was on it?

A. Yes sir.

Q. Who else was on it?

A. Just us two, in the cab.

Q. I did not ask you that,—I asked you who else was on the engine?

A. Bill Riggs.

Q. Was he a switchman?

A. Yes sir.

Q. And where was he on the engine?

A. He was on the step that comes up to the cab on the engineer's side?

Q. He was on the step on the south side of the engine?
A. Yes sir.
Q. Right on the outside?
A. Yes sir.
Q. Mr. Matthews, the condition as to steam and smoke being as it was there at that time and place, did it make any difference whatever in the ability of yourself to see the track in the direction
298 the engine was moving because of the kind of engine you were using that day?

Mr. Comstock: The plaintiff objects to that question as calling for the conclusion of the witness, and argumentative, and improper cross examination.
Overruled. Exception.

A. Yes sir.
Q. What difference?
A. The difference is the rigular switch engine,——
Q. Never mind, what difference did the kind of engine you were using that day make in your ability to see the track in the direction you were going?
A. The high tank.
Q. Then you mean to say that the steam and smoke was so dense that you could not see your engineer across the cab?
A. It was.
Q. That being the case, what difference did the height of the tank make in your vision,—the range of your vision?
A. It makes a difference that you cannot see over it.
Q. At that time and under those conditions?
A. I do not know as it would make any.
Q. That is it exactly. You know it would not, don't you, Mr. Matthews, what is meant by the words "spotting engines"?

Mr. Comstock: The plaintiff objects to that question as improper cross examination.
Overruled. Exception.

A. It is meant you bring them out of the round house and spot them at this track ready to go out, ready for the engineer to take them out.
Q. Now then, at the Sidney yards, at that time where was it the practice to spot them,—where was it the practice and custom to spot the engines?

299 Mr. Comstock: The plaintiff objects to that question as improper cross examination.
Overruled. Exception.

A. They were spotted east of the turn table, and west of it.
Q. And west of the water crane?
A. Well, west of the turn table, and east of the turn table.
Q. Now with reference to the water crane, where were they spotted, —the water crane that you have been talking about?

A. Well sometimes they would be spotted west and other times east.

Q. Then an engine which was spotted,—which was called and spotted for an eastward trip, would be spotted east of the turn table?

A. No, the engines that were west, were spotted there too.

Q. But an engine which was to run eastward backing up, where would that be spotted?

Mr. Comstock: The plaintiff objects to that question as calling for the conclusion of the witness and improper cross examination.

Overruled. Exception.

Q. With reference to the turn table and east or west of it?

A. Well, they were spotted on both sides of the turn table.

Q. And you say they were spotted on either side of the turn table regardless of where they were going to, whether they were going to back or run forward?

A. Yes sir.

Q. At any event, all engines were spotted on that track, that ran into the turn table?

A. Yes sir.

Q. And that is where the engineer that was going out on an engine expected to find his engine, and went to take it?

A. Yes sir.

300 Q. The engines that once were spotted, remained spotted until the engineer took them out on his run?

A. Yes sir.

Q. Are you sure now, Mr. Matthews, that at the time of this accident, there were three engines spotted around that water crane?

A. Yes sir.

Q. Do you know which engine Mr. Huxoll was to go out on?

A. No sir.

Q. Were there more than two engines going out to pull that in,—in that freight train from Perdue.

Mr. Comstock: The plaintiff objects to that question as improper cross examination.

Sustained. Exception.

Q. Do you know whether there were more than two that were going out after that train at Perdue?

Mr. Comstock: The plaintiff objects to that question as immaterial and improper cross examination.

Sustained. Exception.

Q. Now you say that there was no curtain or blind on the engineer's side of the cab, on 213, at the time of the accident?

A. No sir.

Q. Was there any on the other side?

A. Well, I do not understand what you mean by a curtain or a blind on either side.

Q. Well, you seemed to understand it when they asked you?

A. Well there is a window there.

Q. Well, you know what a curtain is, don't you?
A. Yes sir.
Q. Well, was there any on your side?
A. No sir.
301 Q. Any on the engineer's side?
A. No sir.
Q. Now you say the curtain was down at the back of the cab?
A. Yes sir.
Q. That was a canvas curtain that fitted up against the edge of the cab?
A. Yes sir.
Q. And between the cab and the tender?
A. Yes sir.
Q. Now in weather like that day, was it usual and customary to have that curtain down?
A. I don't know whether or not it was, but we had it down.
Q. Weren't you in the habit of running on that engine in those yards under such extreme weather with the curtain down?
A. No sir.
Q. What made you put it down that day?
A. Because it was cold.
Q. You would put it down on any day it was cold, wouldn't you?

Mr. Comstock: The plaintiff objects to that question as argumentative and improper cross examination.
Overruled. Exception.

A. Yes sir.
Q. And that was the usual and ordinary practice there in those yards, on cold days wasn't it, to run with this curtain down?
A. I do not know whether or not it was the usual practice.
Q. As far as you were concerned?
302 A. As far as I was concerned, it was.
Q. Was there any other switching crew in the yards at that time, was there a crew except you and Zimmer?
A. Not that day there wasn't.
Q. Well, was there usually?
A. No sir.
Q. There was only one switching crew, day switching crew there?
A. Yes sir.
Q. And that was you and Zimmer?
A. Yes sir.
Q. And you were in the habit of running with that curtain down?
A. Yes sir.
Q. On cold days?
A. Yes sir.
Q. Now will you tell the jury how that curtain impeded your view of the track on a cold day under the storm and steam conditions that existed?
A. Well, I could not see the track.
Q. Well was that due to the curtain or the steam?

A. Well, it was caused by the steam and the curtain and the tender altogether.

Q. Now what part of your inability to see was caused by the steam?

A. I do not know,—we could not see, that is all I know.

Q. And you could not see because of the steam, isn't that *ture*?

A. Yes sir.

Q. And the curtain didn't have anything to do with it, did it?

A. Well, we could not have seen if the curtain had been up.

303 Q. You could not have seen if you had not had any tender or tank at all?

A. I do not know, maybe we could have seen, and maybe not.

Q. Where was engineer Zimmer at the time you first knew you had hit somebody?

A. He was on his side of the cab.

Q. Standing up or sitting down?

A. Standing up.

Q. You are sure the window was closed on his side?

A. Yes sir.

Q. You took particular notice of that?

A. Yes sir.

Q. You did not take any notice of what they did to get Mr. Zimmer out from under the engine,—or Mr. Huxoll?

A. No sir, I was not there when they took him out.

Q. Where were you?

A. Up in the cab.

It now being 12 o'clock Noon. May 21, 1913, Court adjourned until 2 o'clock P. M. The same day. (This notice of adjournment is in regard to the adjournment taken at the time this testimony was given.

2 O'clock P. M., May 21st, 1913.

Court met pursuant to adjournment, and the following proceedings were had and done.

CHARLES B. MATTHEWS, recalled as a witness for the plaintiff, testified as follows, upon cross examination,

By Mr. Pettis:

Q. Mr. Matthews, at this time, January 1st, 1911, and for

304 some time prior thereto, how many switch engines were there in use in the Sidney yards?

Mr. Comstock: The plaintiff objects to that question as not proper cross examination.

Overruled. Exception.

A. Two or three.

Q. What kind of tanks did the other engines have, other than this 213?

A. Besides 213?

Q. Yes sir.
A. They have their regular switch engine tank, tapering in the back.
Q. The sloping back?
A. Yes sir.
Q. Do you remember the number of the engine?
A. Yes sir.
Q. What was it?
A. 1239.
Q. Now the other engine?
A. 1184.
Q. That you say has a sloping tank?
A. Yes sir.
Q. What other engine was used there for switching purposes?
A. 1606.
Q. Well it is one of what is called the 1600 type?
A. Yes sir.
Q. What kind of a tank did it have?
A. A square tank.
Q. How did that *th*ank differ from the tank on engine 213?
A. The difference is the tank on engine 213, is round and this on 1606, is square.
Q. What was the difference in the coal box, on 1606, on the 1600 type, and the 213 type, or engine 213?
305 A. I could not explain that.
Q. The fact is, they were prac*it*cally the same weren't they?
A. Well, very nearly the same.
Q. The coal box, by coal box, I mean the part of the *of the* tender where the coal is carried,—the coal box, on 1239, was a high square box, wasn't it?
A. Yes sir.
Q. Practically the same as on 213?
A. No, it is not as high.
Q. Not quite as high?
A. No.
Q. How much lower would you say?
A. I should judge about two feet lower.
Q. Now riding in the cab of an engine can you see the track when you are running backward, closer with an engine of a round tank type, than with a square tank type?
A. (Not answered.)
Q. I will put it another way. Riding in the cab of an engine with a round tank, can you see the track nearer to the end of the engine than you can riding in an engine with a square tank?
A. I never noticed.
Q. You never noticed?
A. No sir.
Q. What would be your judgment? Your judgment as a railroad man?

Mr. Comstock: The plaintiff objects to that question as calling for

the conclusion of the witness, and an opinion, and not for a fact, and improper cross examination.

The Court: Answer if you know.

Q. Do you understand me, Mr. Matthews?

306 A. That is all the question?

Q. Yes sir, what is your opinion?

A. Well, I don't see any difference.

Q. Then you think that the round tank would not obstruct your view of the track and the direction you were going backward, any more than the square tank would?

A. I should not think it would because the round tank has a square part to it where the coal is.

Q. Well, I am talking now just about the tank part. Mr. Matthews won't your eye reach the ground quicker looking along the edge of a circular tube than it will along the edge of a square line?

A. I should think it would.

Q. It does as a matter of fact, doesn't it?

A. Yes sir.

Q. Then so far as the tank part is concerned, you will see the track quicker with a round tank than you will with a square one?

A. Yes sir, if there was a square part on top.

Q. Now, on all these engines, both road and switch the coal box is the square part right back of the cab?

A. On the round tank?

Q. On both kinds?

A. Yes sir.

Q. Could you see over that coal box on engine 1239,—you standing in the cab?

A. You mean see back of it?

Q. You could see back of it?

A. Yes sir.

Q. How near the end of the engine would you see the track?

A. Probably 10 or 15 feet from the end.

Q. Looking over the coal box?

A. Yes sir.

Q. You are sure about that?

A. Yes sir.

307 Q. Looking out the window on engine 213, would you see the track quicker than you would looking out of the window on a square tanked engine?

A. I do not know as I would.

Q. How is that?

A. I do not know whether or not I would.

Q. Now, some days there you used a 1600 type engine, for switching and some days you used the 1184, and other days the 1239,

A. Yes sir.

Q. Just as it happened to come convenient?

A. Yes sir.

Q. The men working in the yards and the men having railroad

business in the yards knew that you might be using one kind to-day and another to-morrow?

A. Yes sir.

Q. And the difference in the construction of the engine was plainly visible to anybody that looked?

A. Yes sir.

Q. Now just before the accident you were down in the east end of the yards?

A. Yes sir.

Q. And you started backward,—started westward running backward?

A. Yes sir.

Q. Now as you approached this cloud of steam did you slow up any?

A. No, we did not.

Q. You did not?

A. No sir.

Q. Were you running that morning with any extra precaution to avoid accidents?

308 Mr. Comstock: The plaintiff objects to that question as calling for the conclusion of the witness and improper cross examination.

Sustained. Exception.

Q. Were you running at the time just before the accident and just before you went into this cloud of steam, with any extra precaution or more carefully than usual?

Mr. Comstock: The plaintiff objects to that question as calling for the conclusion of the witness, and not asking for a fact, and improper cross examination.

Overruled. Exception.

A. No sir.

Q. When your deposition at Rock Springs or wherever it was, in Wyoming, was taken, I will ask you if this question was not put to you, "Weren't, you using more precaution, weren't you more careful that morning"? and didn't you answer, "I think we were."

A. I do not remember that I did.

Q. Will you say you did not so answer, Mr. Matthews, what is your answer?

A. I have answered.

Q. (The last question read.)

A. I say I do not remember whether or not I did.

Q. Do you remember whether that question was put to you?

A. No sir.

Q. Wasn't this question put to you at the same time and place: "Weren't you running slower that morning than usually?" And didn't you answer, "Well, we were not running that day as fast as it was customary to run."?

309 A. Yes sir.

Q. And that answer was made by you?

A. Yes sir.
Q. And that question was asked you?
A. Yes sir.
Q. Now with reference to the engine around the water crane, at the time your deposition was taken there, I will ask you if this question was not put to you, "There was no engine standing there that morning was there?" and if you did not answer, "I did not see any."

Mr. Comstock: That question objected to by the plaintiff, as indefinite and no certain place fixed, in the question asked, as to where it refers to.

The Court: If you understand the specific time, and place, you must answer.

Q. Did you give more than one deposition, in this case, in Wyoming?
A. No sir.
Q. And that was a deposition taken on October 5th, 1912.
Q. If I remember right, I believe it was.
Q. At the office of T. S. Tolliver, Jr., in Rock Springs, Wyoming?
A. Yes sir.
Q. And Mr. Walter V. Hoagland, counsel for the plaintiff was present at the time?
A. Yes sir.
Q. That is the only deposition you ever gave in this case?
A. At that time it was.
Q. Have you ever given any other deposition in this case at any time, or place?
A. I did.
Q. What?
A. No.
310 Q. Now you only gave one deposition?
A. Yes sir.
Q. A deposition and a statement are two different things. Now then, at the time you gave that deposition at Tolliver's office, on October 5th, 1912, I will ask you if this question was not asked of you, "There was no engine standing there that morning, was there," and if you did not make this answer, "I did not see any."
Q. I do not know what time in the morning you mean?
Q. I am asking you if this question was not put to you out there and if you did not make answer that way?

Mr. Comstock: The plaintiff objects to that as there is no foundation for an impeaching question. There is nothing here to impeach.

The Court: The witness has stated that he does not know what you refer to.

Sustained. Exception.

Mr. Pettis: The defendant offers to prove that at the time the deposition of this witness was taken on October 5th, 1912, at the office of T. S. Tolliver, Jr., the question above quoted was put to the witness, and he made answer as above read. This is for the purpose of testing the recollection of the witness, his credibility, and

for whatever impeachment value it may have as to his testimony this morning, as to the number of engines there were there at the time of the accident.

Mr. Comstock: The plaintiff objects to that offer as immaterial, irrelevant and incompetent, and not an impeaching question. And improper cross examination.

Sustained. Exception.

311 Q. Mr. Matthews, you got off the engine shortly after you stopped there at the time, Mr. Huxoll was hit?

A. Yes sir.

Q. When on the groung could you see the rails of the track?

A. Yes sir.

Q. Being on the ground you could see the rails you were running on, plainly and distinctly?

A. Yes sir.

Q. What kind of a bell ringer was that on this engine?

A. Do you mean the automatic bell ringer?

Q. Yes sir.

A. It was operated by steam.

Q. The bell ringer was operated by steam?

A. Yes sir.

Q. The automatic bell ringer was operated by steam?

A. Yes sir.

Q. Are you sure about that?

A. Yes sir.

Q. Do you know the name of the kind of bell ringer there was on there?

A. No sir.

Q. Do you know of the Gollmar Bell ringer?

A. No.

Q. Is there such a thing as a Gollmar bell ringer?

A. I do not know.

Q. How does the bell *ringer* work,—the automatic bell ringer,—when I am talking about a bell ringer, I am talking about an automatic bell ringer, and about that all the time?

A. There is a valve in the cab, you turn that on and it will ring the bell.

312 Q. There is a valve in the cab, you turn that on and it will ring the bell?

A. Yes sir.

Q. How?

A. I can't explain that.

Q. Did you ever examine the working of an automatic bell ringer?

A. No sir.

Q. Do you know its mechanism and how it is made?

A. No sir.

Q. Do you know its principles or how it operates or works?

A. No sir.

Q. This valve you say you turned, where is that located?

A. It is inside of the cab.

Q. On the back end of the boiler?

A. Yes sir.
Q. It is on the boiler?
A. Yes sir.
Q. In convenient reach to the engineer's left hand?
A. Yes sir.
Q. When you were giving your deposition out there to Wyoming, weren't you asked the question as to whether or not you rang the bell at the time or just before this accident, and if you did not make the response that you did not,—because it was not your duty to ring it that morning?
A. Well, I could not ring it that morning.

Mr. Pettis: The defendant objects to that and moves to strike out the answer as not responsive.
Sustained. Exception.

Q. (Question read.)
A. I did.
Q. Now this valve as you say, is on the end of the boiler,
313 within the reach of the engineer's left hand?
A. Yes sir.
Q. Now, isn't it a fact that it — always pretty hot around the end of the boiler, even on cold days?
A. Yes sir.
Q. Now you tell this jury that when you turned that valve the bell would ring?
A. Yes sir.
Q. Now the connection between that valve and the bell is a pipe, isn't it?
A. I don't know.
Q. You have been a fireman?
A. Yes sir.
Q. Didn't you ever walk along the running board of an engine?
A. Yes sir.
Q. In cold weather?
A. Yes sir.
Q. Did you ever happen to put your hand over onto the boiler jacket?
A. Yes sir.
Q. What was the condition that you found as to hear or cold?
A. It was warm.
Q. And it is always warm?
A. Yes sir.
Q. Now you will have the jury understand that the valve froze up so that the bell ringer would not work?
A. I do not know whether or not it did, or what was the matter of it, but it was not in working condition.
Q. Then you now mean to say, that you do not know whether ir was froze or what was the matter?
A. I never examined it.
Q. (Question read.)
A. I say it was not in working condition?

Mr. Pettis: The defendant moves to strike out the answer of the witness, as not responsive to the question.
Sustained. Exception.

314 Q. (Question read.)
A. I do not know.
Q. So when you have been saying that that was frozen up, you do not want to be so understood now do you?
A. I do not remember of saying that.
Q. How is that?
A. I do not remember of saying that.
Q. You did not say that this morning?
A. I might have said it.
Q. Well, do you still say it?
A. I cannot answer that question.
Q. You cannot answer now as to whether you still say it was frozen or not?
A. I can not say positively it was froze, but I know it was not working.

Mr. Pettis: The defendant moves to strike out the answer of the witness as not responsive to the question.
The Court: Do you understand the question.

A. No, I do not quite understand it?
Q. (Last question read.)

The Court: Put the question in a different form, the witness having stated that he does not understand the question.
Mr. Pettis: I submit that the question is perfectly plain, and intelligent, and I prefer to leave my record that he is not able to answer it.

Q. Now how many kinds of brake were there on that engine, 213, at that time?
A. How many kinds?
315 Q. Yes sir?
A. As far as I know there was just one kind.
Q. What kind was that?
A. I could not tell what kind it is.
Q. Do you know what a straight air brake is?
A. Yes sir.
Q. What is it?
A. Well, I know where it is located, and how it works.
Q. You know where it is located, and how it works?
A. Yes sir.
Q. Do you know what an automatic air brake is?
A. Yes sir.
Q. What is it?
A. I cannot explain what it is?
Q. Now as a matter of fact wasn't there on that engine 213, that morning, a straight air brake, and an automatic air brake?
A. There was.
Q. Which ones do you say was frozen?

A. Both.
Q. Do they both work in the same manner?
A. Yes sir.
Q. Do they both get their supply from the same source?
A. Yes sir.
Q. What works them; steam?
A. The air works them.
Q. And they get their air from the reservoir?
A. Yes sir.
Q. A common reservoir?
A. Yes sir.
Q. Where is that reservoir?
A. It is on the side of the boiler.
316 Q. Up against the side of the boiler?
A. Yes sir.
Q. Now do you state to this jury that that reservoir was frozen that morning?
A. I did not.
Q. You did not?
A. No sir.
Q. Do you now?
A. Do you mean the steam reservoir?
Q. The air reservoir that works the pumps and the brakes?
A. No it wasn't frozen.
Q. Now that reservoir is on the side of the engine up against the boiler?
A. Yes sir.
Q. And to release that air or draw that air from the reservoir, and supply it to the brake, is done by the turn of a lever in the cab?
A. Yes sir.
Q. And that lever is up against the end of the boiler?
A. Yes sir.
Q. And within reach of the engineer's left hand?
A. Yes sir.
Q. Do you mean to tell the jury that lever or either of those levers was frozen?
A. No, I did not say that.
Q. Then the reservoir was all right?
A. Yes sir.
Q. And the levers were all right?
A. Yes sir.
317 Q. How does the air get from the reservoir to the lever,—by a pipe?
A. Through a pipe.
Q. Does that run up against the inside of the boiler?
A. Yes sir.
Q. And under the jacket?
A. Yes sir,—I ain't sure about that.
Q. Now do you tell the jury that air pipe was frozen up that morning, up against the boiler?
A. No.

Q. Mr. Matthews, I will ask you as a fireman, if it is not a fact that there are air bell ringers as distinguished from steam bell ringers?

A. I do not understand the question.

Q. Well, that there are bell ringers that work by compressed air, as well as those that work by steam?

A. Well, there might be.

Q. Don't you know that there are?

A. I ain't positive about it.

Q. Do you know the kind of the bell ringer that was in use by the Union Pacific at the time of this accident as to whether it was air or steam?

A. I suppose it was steam.

Q. You suppose it was steam,—do you know?

A. No, I could not tell.

Q. Now, Mr. Matthews, isn't it a fact that there are bell ringers made to be worked by air instead of by steam?

A. I do not know.

Q. And isn't it a fact that they are so made because of, or to avoid troubles due to freezing during cold weather,—the air ringer?

A. I do not know whether or not they are.

318 Q. These automatic bell ringers whether worked by steam or air, are of a kind that do away with the use of a bell cord, aren't they?

A. Yes sir.

Q. So that an engine equipped with an automatic bell ringer, does not need any bell cord in order to ring the bell?

A. Well, some engines have both.

Q. Please answer my question?

A. I do not think it would.

Q. Now with the automatic bell ringer, you simply turn this valve, and the bell will ring all the time until you shut it off?

A. Yes sir.

Q. You said this morning that you were instructed at some time or other that there was a custom to stop an engine in a condition like this, and send a flagman ahead. Now I will ask you whether or not you have been testifying as to conditions in switch yards, or as to conditions out on the main line, when trains were running between stations and ran into a fog, where they could not see ahead or see a signal?

A. Well, I was testifying to both.

Q. Was there any rule of the Union Pacific of that nature at that time?

A. (No answer.)

Q. Was there any rule of the Union Pacific that required Mr. Zimmer, under conditions that were then existing at that time, the time of *of* this accident, to have stopped and sent a flagman ahead,—any printed rule?

A. Yes sir, there was.

Q. Where is your book of rules that you have put in evidence?

319 Mr. Rose: We did not offer it in evidence, but here it is.

Q. Now, your exhibit 2, that is the book of rules isn't it, that was in force at that time, on that division of the Union Pacific?

A. Yes sir.

Q. Will you turn to that rule you speak of?

A. Here it is.

Q. What rule is that?

A. Rule 99.

Q. Found on page- 27 and twenty-eight, of this book, Exhibit 2, is it?

A. Yes sir.

Q. Will you read to me, or to the jury from that rule the words which say that a switch engineer operating in the yards, when running into a cloud of steam or smoke should stop and send a flagman ahead to flag himself through?

A. I could not say that.

Q. That is just what I am asking you, if you will read me that sentence or any sentence containing those words, or words of that kind or meaning?

A. I cannot because it is not in here.

Q. That is it. You speak Mr. Matthews, of a custom or practice to have a switchman on the leading end of the engine, working in the yards. Now then I will ask you if it is not the fact that the switchmen ride on the switch engine while working in the yards, at whichever end of the engine, will let them off nearest to the point where they are going to work again?

A. I have seen them do that, yes sir.

Q. Isn't that the custom?

A. No sir.

Q. It is not?

A. No sir.

320 Q. Isn't it the custom of switchmen and wasn't it at that time, in the Sidney yards, to,—for the switchman, if the engine was backing up on the main line,—to go by a switch and head in on another track,—for the switchman to ride on the pilot end of the engine?

A. It might have been.

Q. And wasn't that the object of that order, that they might drop off the engine at the nearest point to the switch after the engine came to a stop?

A. I do not know.

Q. Assuming the engine to be running backward to head into a string of cars,—to hitch onto a string of cars, and then pull them forward, wasn't it a custom for the switchman to ride then on the rear end of the engine,—being in that instance the leading end of the engine?

A. Do you mean the front end of the engine?

Q. No, it confuses us all probably a little to talk about the front and back of the engine under these conditions, and circumstances. Your engine is here, facing the east, and it is backing up, the object of the movement being to hitch onto a string of cars and pull them somewhere. Now isn't it a custom for a switchman in such an instance to ride on the back of the tender?

A. It is, if you make it that way.
Q. Then is all your testimony in regard to custom or practice to be understood as to what the particular switchman made it or did?
A. Well, the custom might be one thing, and they would do another.
Q. Well, what is your notion of custom. When the custom was to ride here, but the switchmen usually ride somewhere else, it would not be a custom?
A. It would be a custom of his own.
321 Q. Was there any rule of the Union Pacific, governing the operation of the switchmen in the Sidney yards, at that time, requiring the switchmen to ride on the leading end of the engine?
A. I never seen one.
Q. Don't you know as a matter of fact there was?
A. I could not state because I never seen one.
Q. Don't you know, Mr. Matthews, that there was a rule at that time forbidding a switchman riding on the front end of the engine, that is the end of the direction it was going?
A. No sir.
Q. Will you say there wasn't such a rule?
A. I say I do not know there was any.
Q. Were you familiar with the book of rules?
A. Yes sir.
Q. At that time, wasn't there a rule in force governing Sidney yards, that all employees are warned that they must not rely on others to notify them, of the approach of a train?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial, and not proper cross examination.
Overruled. Exception.

A. I never saw such a rule.
Q. Now calling your attention to Exhibit 2, I will ask you if rule 715, does not so provide?

Mr. Hoagland: The plaintiff objects to that question as incompetent, and the rule itself is for the construction of the court and jury, and for the,—not for the witness's conclusion.
Sustained. Exception.
Mr. Pettis: The defendant now offers as a part of the cross examination of this witness, rule 715, as found in Exhibit 2.
No objection.
322 Received in evidence and read to the jury, and a copy of the same, or the original is hereto attached and made a part of this record.

Q. Now, Mr. Matthews, calling your attention to Rule 713, in Exhibit 2, was that rule in force at this time, in those yards?
A. 713.
Q. Yes sir?
A. I do not know whether or not that was in force, or not.
Q. That rule is contained in the same book that you just said was the book of rules, in force at that time and place, isn't it?
A. Yes sir.

Mr. Pettis: The defendant offers the following from rule 713. "Employees: They are warned not to get on the front or rear of an engine or the end of a car as it approaches them, or to go between cars in motion, to couple, open, cl-se or arrange knuckles, or couplers, or follow other dangerous practices."

Mr. Rose: We ask the privilege of reading the rule entirely. No objection. Plaintiff reads the whole rule. Defendant offers whole rule 713 read.

Mr. Rose: The plaintiff offers all of rule 713.

Q. Now, Mr. Matthews, I will ask you again if this switchman riding on the end of the engine, or these switchmen, were not riding there for their own convenience with reference to their work?

A. Well, they might be.

Q. Wasn't there a rule out there at the Sidney yards, at that time that prohibited switchmen or other employee- from hopping onto an engine while in motion?

A. Not that I know of.

Q. You will not say there was not such a rule?

A. No, but I will say I did not know of it.

Q. And wasn't there a rule and weren't there instructions that they should stop the engine or a train of cars as the case may be for them to get onto it?

323 Mr. Comstock: The plaintiff objects to that question as wholly immaterial, and unintelligible.

The Court: Do you understand the question.

A. No.

Q. Well, Mr. Matthews, wasn't there instructions out governing the Sidney yards, at that time, the time of this accident, that if a switchman or other employee desired to get onto a moving switch engine, or train of cars which was moving, that it was his duty to flag them and stop them before he attempted to get on and not attempt to get on while they were in motion?

A. Yes sir.

Q. Now Mr. Matthews, while, or at the time your deposition was given, and taken in Rock Springs, Wyoming, on October 5th, 1912, I will ask you if you did not then state that as Mr. Zimmer ap-roached this cloud of smoke and steam from the east, just prior to the Huxoll accident, that he did (not) slow down,—meaning that he slackened his speed, or the speed of his engine?

A. I do not remember of it.

Q. Are you sure you did not make that statement, or that in substance?

A. I could not say.

Mr. Pettis: The defendant asks leave to later offer, in the event it is found, the statement of the witness as contained in his deposition, as made by him at the time his deposition was taken at Rock Springs, Wyoming, on October 5th, 1912, which statement was in substance that as he approached the cloud of steam or smoke, from the east over the track, at the water crane, they slowed down. And

defendant further says that if it is unable to find it he will request the court to say that the statement is not to be considered.

324 Q. Are you familiar with the rules of the company, of the Union Pacific, with reference to making reports of accidents, when they occurred, — those of the employees who witnessed the accident?

A. Yes sir.

Q. There was a rule that required employees to make a report of the accident and how it happened?

A. Yes sir.

Q. Did you make such a report of the Huxoll accident?

A. I did.

Q. Calling your attention to Exhibit 5, I will ask you whether or not that is your signature?

A. Yes sir.

Q. Exhibit 5, is that one of the regular blanks of the Union Pacific, used by them at that time for making report of accidents?

A. I think it is.

Q. That is the report that you made on January 1st, 1911, of this Huxoll accident to the Union Pacific Railroad?

A. I do not know whether or not it is the same one.

Q. It is all on one sheet of paper, isn't it?

A. Yes sir.

Q. And your signature is on the sheet, isn't it?

A. Yes sir.

Q. And your signature is on the sheet, isn't it?

A. Yes sir.

Q. It is all in printing or typewriting, isn't it, except your signature?

A. Yes sir.

Q. Did you make any more than one statement at that time?

A. No sir.

325 Q. Then why do you say you do not know whether this is your statement or not?

A. I say that is my signature, I haven't read the statement.

Q. Read it?

A. I acknowledge, part of it.

Q. What part of it is it you do not acknowledge?

A. As to the bell ringing.

Q. Is that all?

A. That is all I can remember.

Q. Then when you made out this written report and said that the bell was ringing at the time, referring to the time of the accident, you deny that now?

A. I do not remember of having said that.

Q. Will you say you did not say it?

A. I am positive I did not.

Q. You are positive you did not?

A. Yes sir.

Q. Is there anything else in this statement that you now deny having made?

A. I cannot say because I did not,——

Q. Well, look it over some more?

Mr. Comstock: The plaintiff objects to that because it is illegible, it is almost impossible.

(No ruling.)

Q. I am asking you now if there is another part of that statement that you now deny?

A. I would like to know what part.

Q. I repeat the question?

A. As to the speed of the engine.

Q. You now deny your statement there as to the speed of the engine at the time of the accident?

A. Yes sir.

326 Q. Is there anything else there you now deny?

A. No sir.

Q. Then this answer in this statement is correct, "Fireman Dupont told Huxoll that he had better look out for he heard the bell ringing."

A. No.

Q. Now during this recess, Mr. Comstock, came to you and told you that you could not read this because it was illegible?

A. No sir.

Q. You say now, that during this last recess while you were still sitting in that chair, with this paper in your hand, attorney Comstock, did not come up to you and there make the remark that it was not legible?

A. He did not say it that way.

Q. What did he say?

A. He asked me if it was plain enough to read, and I said it was not.

Mr. Comstock: And then I told you to call the attention of the Court to that fact, if it was not plain enough, didn't I?

A. Yes sir, I could tell what it was if I took the time.

Q. Well, you looked at that as long as you wanted to, during this recess, didn't you?

A. I can't answer that question.

Q. You cannot answer that question. Now during the recess and just before it closed, you were holding the paper down in your lap, and I came up to you and said you do not need to sit here with the paper unless you want to look at it?

A. Yes sir.

327 Q. And that is all I said?

A. Yes sir.

Q. Are there any erasures on this paper that you can discover?

A. There is one here?

Q. Where?

A. Right here (Indicating).

Q. In the heading B, under the numeral 19, there has been some typewriting, and then crossed it out by typewriting?
A. Yes sir.
Q. And that same thing is put down in answer to the next question? Isn't it?
A. Yes sir.
Q. In other words, that line that is Xd out, was put in the wrong place, wasn't it?
A. I think so.

Mr. Pettis: The defendant, as a part of the cross-examination of this witness, offers in evidence, Exhibit 5.

Mr. Rose: I do not think there will be any objection to the Exhibit, but we want to reserve the right to examine the witness on the details of Exhibit 5. Exhibit 5 received in evidence and read to the jury, and a copy of the same, or the original is hereto attached, and made a part of this record.

Q. As you are now sitting on the witness stand, you are facing the windows in this room aren't you, on the west side of the room?
A. Well, I am turned in directions.
Q. You are facing the windows aren't you?
A. Yes sir.
Q. And the light from those windows shines in your eyes, doesn't it?
A. Yes sir.
Q. And was that the cause that you could not clearly read that paper, Exhibit 5?
A. I do not know.
328 Q. Do you know Mr. L. E. Johnson?
A. Yes sir.
Q. Calling your attention to Exhibit 6, is that your signature,—Exhibit 6, contains three sheets doesn't it?
A. Yes sir.
Q. Is that your signature at the bottom of page 3?
A. Yes sir.
Q. Whose writing is the body of that exhibit *it*?
A. I could not state positively whose it is, but I suppose it is Mr. Johnson's.
Q. Mr. Johnson took from you a statement as to how this Huxoll accident occurred, didn't he on January 2nd, 1911?
A. Well, he wrote a statement, yes sir.
Q. Where?
A. At the Union Pacific Hotel at Sidney.
Q. You and he were there?
A. Yes sir.
Q. He was asking you tell him the facts connected with the accident?
A. Well, he did not ask me that way?
Q. Well, he asked you about the accident, and how it happened?
A. Well, shall I explain the way he asked me?
Q. Answer my question please?

A. No, he did not ask me that way.
Q. Did you discuss with him how the accident happened?
A. No sir.
Q. You did not?
A. No sir.
Q. You did not tell him anything about how it happened?
A. Well, I can tell you how I did tell him.
Q. Answer my question.
A. I said no.
329 Q. How did you come to sign this Exhibit 6?
A. Well he told me that he made this one out as to how the rest of them was made.
Q. Did you read this over?
A. No sir.
Q. Did he read it to you?
A. Yes sir.
Q. And then you signed it did you?
A. Yes sir.
Q. Now did he read this to you, didn't he, "Our engine was running through this smoke or fog not to exceed three or four miles an hour"?
A. I never remember of him reading it.
Q. Will you say that he did not?
A. He did not.
Q. Did he not read this statement to you,—and didn't you sign the sheet containing the statement, "The bell on our engine was ringing while passing through this fog and the same operated by automatic bell ringer.
A. No sir.
Q. He did not read that to you?
A. No sir.
Q. Did he read this sentence to you just above your signature, "The above statement is ture and correct"?
A. I do not remember.
Q. Will you say that he did not?
A. No sir, I would not say that.
Q. Isn't it a fect that on the 1st day of January and on the 2nd day of January, 1911, you twice made a statement, and you each time made a statement concerning this accident in which you said the bell was ringing and your speed did not exceed tnree or four miles an hour at the time of the accident?
330 A. I do not remember of making one.
Q. You didn't make one statement to that effect, did you?
A. Not about the bell ringing.
Q. Did you make one statement, as to the rate of speed and fix it at three or four miles an hour?
A. No sir.
Q. You did not?
A. No sir.
Q. When did you make up your mind to deny those statements?

Mr. Rose: The plaintiff objects to that as merely argumentative, and assumes that he made up his mind to deny them.
Sustained. Exception.

Q. When did you conclude that you were mistaken as to whether or not the bell was ringing?

Mr. Hoagland: The plaintiff objects to that for the same reason as before, and that he never stated that the bell was ringing.
Sustained. Exception.

Q. When did you first make up your mind that you were mistaken when you said that the rate of speed was three or four miles an hour?

Mr. Hoagland: The plaintiff object- to that question it is argumentative, and assuming that he made up his mind to that effect.
Sustained. Exception.

Mr. Pettis: The defendant offers in evidence Exhibit 6, as a part of the cross examination of this witness.
Mr. Rose: No objection, but we reserve the right to examine in regard to the details of the exhibit. Exhibit 6, received in evidence and read to the court and jury, and a copy of the same, or the original is hereto attached, and made a part of this record.

331 Q. Now Mr. Matthews, at the time your deposition was taken at Rock Springs, that statement Exhibit 6, was read by you and incorporated into your deposition, wasn't it?
A. Yes sir.
Q. And you did that at the request of Mr. Muir, who was acting for the defendant?
A. Yes sir.
Q. And at that time and place, Mr. Muir asked you this question didn't he, "At the time you signed this statement on January 2nd, 1911, was the statement read to you?" and you made this answer, "I cannot remember whether or not it was," didn't you?
A. I do not remember.
Q. You don't remember now whether you made that answer to that question?
A. No sir.
Q. And wasn't this further question put to you at that time and place "Didn't you state to me this morning" meaning to Mr. Muir, "that this statement was read to you" and didn't you answer "I do not know whether or not I did"?
A. I do not remember.
Q. You do not remember whether that question was put to you?
A. No sir.
Q. I will ask you now did you tell Mr. Muir that morning before your deposition was taken there at Rock Springs, that this statement, Exhibit 6, was read to you?
A. Before the deposition?
Q. Yes sir, before the deposition was taken?
A. No sir, I did not.
Q. How is it that you can remember now you did not say to him

that it had been read to you, and you could not remember that afternoon as to whether or not you said it?

332 A. Because I know he never asked me that.

Q. Do you mean to say now that that question was not put to you by Mr. Muir, as to whether or not you had not told him that morning, that the statement was read to you?

A. No sir, I did not.

Q. You did not make that statement?

A. Not to him.

Q. Who did you make it to?

A. Nobody.

Q. At that time and place, before your deposition was taken, didn't Mr. Muir read this exhibit 6, over to you or let you read it?

A. At the time of the deposition?

Q. Yes sir?

A. Yes sir.

Q. And didn't he ask you then what made you change from the statement that the bell was ringing to one that it was not and from a statement that the speed was three or four miles an hour to a statement that it was eight of ten miles an hour, and didn't he ask you what made you change your story in that regard?

A. I do not remember.

Q. And didn't you tell him in substance that you had had a new light on it since Hoagland got out there?

A. No sir.

Q. You did not?

A. No sir.

Q. At that time you did not deny having made a statement that the bell was ringing did you?

A. I do not know whether or not I did.

Q. You were discharged from the employment of the Union Pacific, weren't you?

A. Yes sir.

333 Q. And you were discharged because you let an engine and a string of cars get away from you and get onto the main line?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial, and not proper cross examination.

Sustained. Exception.

Q. How did you come to come down here to testify in this case?

A. I was sent for.

Q. Who sent for you?

A. Mr. Hoagland.

Q. Did he send anybody for you?

A. Yes sir.

Q. Who?

A. Jim Keefe, I think his name is.

Q. Who is he?

A. I do not know,—I know his name.

Q. Where does he live?

A. North Platte.

Q. What did he pay you for coming down?
A. I suppose he paid my fare down here and back.
Q. What else?
A. That is all I know of.
Q. Have you any arrangements with him as to how much they were to pay you?
A. No sir.
Q. Didn't he arrange to pay for your time?
A. Well, we haven't made any arrangements.
Q. Haven't you said since you have been here that it would cost them $500 to get you down here?
A. No sir.
Q. Have you stated to anybody here any sum that it would cost?

334 Mr. Rose: The plaintiff objects to that question as too indefinite.
Sustained. Exception.

Q. What interest have you got in this litigation?
A. None at all.
Q. Do you know a man by the name of Dunlop?
A. No, I do not think I do.
Q. Was there a man out on the ranch on which you were working last winter by the name of Dunlop?
A. Yes sir.
Q. Then you know Dunlop?
A. Yes sir.
Q. Did you have a conversation with him, say in substance, sometime last November, or December, that you had been fired by the Union Pacific, and you tried to work up a damage suit against them to get even with them?
A. No sir.
Q. How is that?
A. I never had a conversation with him.
Q. Did you say that in substance to him?
A. I never had a conversation with him at all.
Q. Never spoke to him?
A. Oh, I spoke to him, yes sir.
Q. How long was he there?
A. Probably a week or two.
Q. Wasn't he there about two months.
A. No, I can show you a book that he wasn't there that long.
Q. Have you got the book with you?
A. No sir, but I could send it here.
Q. Didn't you tell him,—calling your attention to another incident, that happened out there. Weren't you and Mr. Punlop together down near the railroad of the Union Pacific tracks
335 one day, when a freight conductor of the U. P. passed along and you said, "Dunlop, that is the man that is going to help me out in my damage suit, or was, but he got cold feet and so I quit."
A. No sir.

Q. You did not say that in substance?
A. No sir.
Q. When Mr. Hoagland was out there taking your deposition, what arrangements did you make with him for pay?
A. Why, he paid me for my time I lost.
Q. What else?
A. And my expense at the hotel.
Q. What else?
A. My fare.
Q. What else?
A. That is all.
Q. What did he promise to give you if you won this law suit?
A. He did not promise me anything.
Q. Have you ever told anybody you were promised something if this suit was won?

Mr. Rose: The plaintiff objects to that question as too indefinite, let them give the name of the person he told.
Sustained. Exception.
Mr. Pettis: The defendant offers to prove that the witness, has at divers times, made the statement, that he was to be liberally rewarded in the event the plaintiff won this suit.
Mr. Rose: The plaintiff objects to that offer as too indefinite.
Sustained. Exception.

336 Q. Have you ever had any promise of anybody else other than Mr. Hoagland for compensation or pay, in case this suit was won, in consideration of your giving the testimony you have given?
A. No sir.
Q. No person at all?
A. No sir.
Q. For how long a time after the Huxoll accident did you remain in the employ of the Union Pacific?
A. I could not tell for sure,—four or five months.
Q. Wasn't it 8 or 9 months.
A. Maybe it was.
Q. And didn't you so state in your deposition?
A. Well I said four or five months, more or less. I cannot state the exact time.
Q. And you do not remember now what you said in your deposition about that?
A. No sir.
Q. What was the nature of your employment by the company after the Huxoll accident?
A. Do you mean what kind of work?
Q. Yes sir.
A. After the accident.
Q. Yes sir.
A. Extra fireman and hostler.
Q. The same kind of work you were doing at the time of the accident?

A. Yes sir.
Q. What did you quit for?

Mr. Rose: The plaintiff objects to that queshtion as a mere repetition.
Sustained. Exception.

337 Q. Mr. Matthews, isn't it a fact that you felt at that time at the time of your discharge, and do yet, that you were wrongfully discharged?
A. No sir, I did not.
Q. How is that?
A. No sir.
Q. You now then are willing to admit that you were rightfully discharged and that the company had good ground for firing you?
A. Oh, I did not understand the question.
Q. Now I will put the question over again. At the time you were discharged and up to the present time, you felt that the company did wrong in discharging you, don't you?
A. Well, I feel as though I was not to blame for the discharge.
Q. And the company should not have discharged you,—that is your feeling?
A. Well, I do not know how they feel about it.
Q. I did not ask you how they felt about it? I asked you how you felt ab-ut it?
A. I do not think so.
Q. What is your feeling about it; Do you feel you were rightfully discharged?
A. No sir.
Q. You feel you were wrongfully discharged?
A. Yes sir.
Q. Now at the time of your discharge you and your family were living in Sidney?
A. Yes sir.
338 Q. After your discharge you and your family were,—you had to go or did go three or four hundred miles west of Sidney, to the ranch you are now on?
A. Yes sir.
Q. And it separated you from your wife and children?

Mr. Rose: The plaintiff objects to that question as immaterial.
Sustained. Exception.

Q. And one strong element of your hurt feelings by your discharge was because the company, took, as you said, the word of a Dago as to how the accident happened, instead of your word?

Mr. Comstock: The plaintiff objects to that question as leading and immaterial and not proper cross examination, and assuming something not proven, and there is no evidence that his feelings were hurt.
Sustained. Exception.

Q. Mr. Matthews, at the time of your discharge, didn't you make

complaint that your superior officer of the Union Pacific had taken the word of a Dago as against your word?

Mr. Comstock: The plaintiff objects to that question as immaterial and improper cross examination.

Overruled. Exception.

A. No sir.
Q. What is that?
A. No sir.
Q. You never did?
A. No sir.
Q. You are sure about that, as sure about that, as the rest you have testified to?

339 Mr. Rose: The plaintiff objects to that question as immaterial, and it cannot be inquired into by impeachment or otherwise.

Overruled. Exception.

A. Yes sir.

Mr. Pettis: Now with the exception I made a while ago, we rest our cross examination of this witness.

Redirect examination.

By Mr. Comstock:

Q. Mr. Matthews you were telegraphed to weren't you by Mr. Hoagland that your deposition previously taken had been suppressed by this court, and he wished you to come to Lincoln, to this trial?

A. Yes sir.

Q. And you answered back that you could not leave your work and get away, didn't you?

A. Yes sir.

Q. And then he sent this man Keefe you speak of to try and persuade you to come down here, didn't he?

A. Yes sir.

Q. Have you any *emn*ity whatever in any particular against this railroad?

Mr. Pettis: The defendant objects to that question as not redirect examination and leading and suggestive.

Overruled. Exception.

A. No sir.
Q. Or any spite against it?
A. No sir.
Q. Or any interest whatever in this law suit?
A. No sir.

340 Q. Did you ask for any compensation for coming?
A. No sir.

Q. Or for taking your deposition?
A. No sir.

Q. And you have no disposition whatever except to tell the absolute truth?
A. No sir.

Mr. Pettis: The defendant objects to that question as leading and suggestive, and not re-direct examination.
Overruled. Exception.

Q. Now in reference to this statement that has been offered in evidence, Mr. Matthews, I want to ask you if you heard Dupont say anything before this engine upon which you were firing number 213, struck Mr. Huxoll?

Mr. Pettis: The defendant objects to that question because it does not reflect the cross examination and nobody asked him whether he heard Dupont say "Get out" he heard the bell ringing, that what the witness was asked and what the statement is, is this, "That Dupont said at the time that he told Huxoll to get out, that he heard the bell ringing."
No ruling. No answer.

Q. Did you hear Dupont make any statement on the day that Huxoll was run down by this switch engine, before this engine hit him, about bells, or where he heard bells?

Mr. Pettis: The defendant objects to that question as not re-direct examination, and not reflecting the cross examination and a mere attmept to befuddle the record.
Overruled. Exception.

A. No sir.
Q. You did not hear Dupont say anything there in that fog?
A. No sir.
341 Q. Or never told anybody you heard him holler there?
A. No sir.
Q. Do you know where Dupont was at the time this engine ran over Huxoll?
A. No sir.
Q. Had you seen him all that day?
A. No sir.
Q. Did you, just prior to that accident, hear anybody make any remark to look out, or bells?
A. No sir.
Q. Now did you write this statement?
A. No sir.
Q. Was it all written up when it was presented to you for signing?
A. Yes sir.
Q. And did you read it yourself at that time?
A. No sir.
Q. And you took their word for what was in it?
A. Yes sir.
Q. And who pretended to read it?
A. L. E. Johnson.
Q. And the last few questions I have asked you here, you understand to refer to Exhibit 5, don't you?

A. Yes sir.
Q. Now was this man Johnson, was he a conductor?
A. No, he was a claim agent.
Q. He is the man who made this statement?
A. Yes sir.
Q. And pretended to read it to you?
A. Yes sir.
Q. You know why the claim agent took these casualty reports in hand?

342 Mr. Pettis: The defendant objects to that question as immaterial and not re-direct examination.
The Court: What do you mean by that.

Q. Is there any rule to your knowledge of this Union Pacific railroad, whereby the claim agent makes these,—and under which the claim agent makes these casualty reports?
A. You mean by that he makes them?
Q. No sir. No, is there any rule that authorizes to make them,—do you know of any rule that gives direction as to how these casualty reports shall be made?
A. No sir.
Q. Now calling your attention to Exhibit 6, was Exhibit 6, all written up when it was presented to you for signature?
A. Yes sir.
Q. And who presented this Exhibit 6?
A. Mr. Johnson.
Q. The same claim agent?
A. Yes sir.
Q. Had you had any conversation with him, or had he talked to you before he presented this written statement?
A. No sir.
Q. And did you read it over yourself?
A. No sir.
Q. Did he pretend to read it?
A. Yes sir.
Q. Did he read a sentence in it that said the bell was ringing when you ran Huxoll down?
A. No sir.
Q. Did he read anything in it that said the engine was going at three or four miles an hour?
A. No sir.
343 Q. You took his word on what it contained?
A. Yes sir.
Q. And relied on it being the truth?
A. Yes sir.
Q. And signed it upon that suggestion?
A. Yes sir.

Mr. Comstock: The plaintiff as a part of the re-direct examination of this witness offers in evidence rule 822, appearing on page 124, of Exhibit 2.

Mr. Pettis: The defendant objects to that offer as immaterial, and irrelevant, and not re-direct examination.

Overruled. Exception.

Received in evidence and read to the jury and a copy of the same is hereto attached and made a part hereof.

Mr. Comstock: The plaintiff now offers as a part of the re-direct examination of this witness, rule 876, appearing on page 129, of Exhibit 2.

Mr. Pettis: The defendant objects to that offer as wholly immaterial, and not re-direct examination, and incompetent, and bearing upon no issue in this case.

Overruled. Exception.

Received in evidence and read to the jury, and a copy of the same is hereto attached.

Q. Was there any conductor with this engine upon which you were operating that killed Mr. Huxoll?

Mr. Pettis: The defendant objects to that question as wholly immaterial.

Overruled. Exception.

A. No sir.

344 Mr. Comstock: The plaintiff offers in evidence as a part of the direct examination of this witness, rule 98, appearing on page twenty-seven, of Exhibit 2.

Mr. Pettis: That is objected to as immaterial,——

Mr. Rose: I have the wrong rule there. Withdrawn.

Mr. Comstock: The plaintiff offers in evidence as a part of the re-direct examination of this witness, rule 759, appearing on page 121, of Exhibit 2.

Mr. Pettis: The defendant objects to that question as immaterial, irrelevant and incompetent, and not within the issues, in this case, and needlessly encumbering the record, and relates to street crossings entirely.

Overruled. Exception.

Received in evidence and read to the court and jury and a copy of the same, or the original is hereto attached and made a part hereof.

Mr. Pettis: The defendant moves to strike out rule 759, for the reason it was objected to, and for the further reason there was no cars involved in this accident.

Overruled. Exception.

Mr. Comstock: The plaintiff now offers in evidence, as a part of the re-direct examination of the witness rule, 102, appearing on page 29, of Exhibit 2.

Mr. Pettis: The defendant objects to the offer as immaterial, and incompetent, and not within the issues, and needlessly encumbering the record.

Overruled. Exception.

Received in evidence and read to the court and jury and a copy of the same or the original is hereto attached and made a part hereof.

Mr. Pettis: The defendant objects to that and moves to strike it from the record as immaterial, irrelevant and incompetent, and not within the issues, and a needless encumbrance of the record.

345 Overruled. Exception.

Q. Mr. Matthews, at the first time you took this engine in the morning at 6 o'clock, on the first day of January, 1911, what was its condition then with reference to the steam pipe, that operated the air pump being forzen up or otherwise?

Mr. Pettis: The defendant objects to that question as not proper re-direct examination, and already gone over by the witness in chief, and assuming facts not proven.

Overruled. Exception.

A. Why they were not in working order on account of the pump not having steam to run it.

Q. Why didn't it have steam to run it?

Mr. Pettis: The defendant objects to that question as leading and not re-direct examination and calling for the conclusion of the witness, and no foundation laid.

Overruled. Exception.

A. Because the steam pipe that connects with the pump was froze.

Q. Now what if anything did you and Mr. Zimmer your engineer, or either of you do to try to thaw it out?

A. We had waste and coal oil.

Q. What did you do with the waste and coal oil?

A. We tried to thaw it out.

Q. How?

A. With a fire.

Q. Were you,—did you accomplish it?

Mr. Pettis: The defendant objects to that question as leading and calling for the conclusion of the witness.

Overruled. Exception.

A. No sir.

Q. And the pumps you speak of were the pumps that pump the air into this air chest that Mr. Pettis called your attention to, Mr. Matthews, weren't they?

346 A. Yes sir.

Q. Mr. Matthews, Mr. Pettis asked you on cross examination, if you thought a switchman, standing on the foot board on the front end of this engine, could have seen further than you in your position?

A. Yes sir.

Q. There would have been nothing in front of him would there to obstruct his view like there was in front of you?

A. No sir.

Q. Who were the switching crew,—what was the full switching crew that was operating this switch engine?

Mr. Pettis: The defendant objects to that question as not proper re-direct examination, leading and assuming.

Overruled. Exception.

A. William Borton, yard master; Riggs, and George Hower.
Q. Where was Hower when this switch engine ran Huxoll down?
A. I do not know.
Q. Well, was he in the neighborhood there anywhere?
A. He was around the yard somewheres?
Q. Well, was he on the engine?
A. No sir.
Q. Was he near the engine?
A. I did not see him.

By Mr. Pettis:

Q. This Exhibit 5, being a typewritten statement signed by you in connection with this accident, did you say that Johnson got that up?
A. I never said that.
Q. Then when you told Mr. Comstock that Johnson got that up, you misunderstood that question?
A. I never said that.
Q. Did Mr. Johnson get up Exhibit 5?
A. I do not know who got it up.
347 Q. Did Mr. Johnson get it up?
A. This leaf was blank when I signed it.
Q. Where did you sign it.
A. He said he wanted to make a copy for himself.
Q. Who said so?
A. Johnson.
Q. Where?
A. At the Union Pacific Hotel.
Q. Was Johnson there when you signed the Exhibit 5?
A. Yes sir.
Q. And you signed this Exhibit 5, at the Union Pacific Hotel?
A. Yes sir.
Q. When did you remember that this was blank,—blank when you signed it,—when did you first remember that?
A. I always knew it.
Q. Why didn't you testify about it before?
A. You never asked me.
Q. So that is the only reason you did not so testify because I did not ask you?
A. Yes sir.
Q. Now, Mr. Matthews, don't you know, that you signed this statement in the office of the yard master there at Sidney on the 1st day of January, 1911?
A. No sir.
Q. You don't know that?
A. I didn't.
Q. Don't you know that when you signed this statement there were three or four others signed by other employees and witnesses of the accident out there and in the yard master's office?
A. No sir.
348 Q. And in some office other than the hotel?
A. No sir.

Q. Didn't you sign this Exhibit 5, in the round house foreman's office at Sidney?
A. No sir.
Q. Do you know W. J. Nicholson?
A. Yes sir.
Q. What was he there at that time?
A. Round house foreman.
Q. And you say you did not sign this in his office?
A. No sir.
Q. And at the same time didn't switchman Riggs, and yard master Borton, and engineer Zimmer, sign similar statements?
A. No sir.
Q. They did not?
A. No sir.
Q. Where does Johnson live?
A. I do not know.
Q. Does he live at Sidney?
A. I do not know.
Q. You do not know whether or not he lived there?
A. He did not when I was there.
Q. He lived at North Platte?
A. I do not know.
Q. What time of day January 1st, did you first see Johnson?
A. That night.
Q. What time?
A. About half past 6.
Q. Where did he come from?
A. I seen him there at the foreman's office.
Q. Do you know where he came from?
A. No sir.
349 Q. At foreman Nicholson's office?
A. Yes sir.
Q. Is that the time you signed this statement?
A. I did not sign that.
Q. Not at all?
A. Not at the office.
Q. When your deposition was taken at Wyoming, I will ask you if you were not asked whether you signed that statement, in blank, and you said that you did not?
A. I do not remember of saying that.
Q. I will ask you if at that time and place, you weren't asked if you were in the havit of signing statements in blank, and if you did not answer that you were not?
A. I do not remember.
Q. How is that?
A. I do not remember.
Q. Well, will you say you weren't,—will you say that did not occurr out there?
A. I do not remember of it.
Q. Well, you won't say it was not put to you and your answer given in that way will you?

A. I said I do not remember whether or not it was put to me.
Q. Now you say that the steam pipe was froze on this 213?
A. Yes sir.
Q. Where does that steam pipe run,—from where to where?
A. It runs alongside of the boiler.
Q. It runs along side of the boiler?
A. Yes sir.
Q. Under the jacket?
A. Yes sir.
Q. Right up against the boiler?
350 A. No sir.
Q. Where?
A. About 4 or 5 inches from the boiler.
Q. From the side of the boiler, the top or the bottom?
A. The side.
Q. Where does it run to,—or where does it start, or where does it run from in the first place?
A. It is connected with the boiler and the air pump.
Q. One end is connected with the live steam in the boiler?
A. Yes sir.
Q. And the other end is connected to the air pump?
A. Yes sir.
Q. And it runs along side the boiler?
A. Yes sir.
Q. What do you mean by live steam,—explain that to the jury?
A. Well, it is hot I guess.
Q. It is scalding hot, isn't it?
A. Yes sir.
Q. It is so hot that if the pipe would break in your face, it would scald you to death?
A. Yes sir.
Q. It was running into the live steam of the boiler?
A. Yes sir.

Mr. Pettis: All right, good bye.

By Mr. Comstock:

Q. What was the condition of the steam pressure on that boiler when Huxoll was killed?
Mr. Pettis: The defendant objects to that question as no foundation laid, and not re-direct examination, and immaterial.
Sustained. Exception.

351 Q. Isn't there a valve Mr. Matthews, that connects this steam pipe with the pump down on the under side somewhere, down by this engine or boiler, isn't there a valve that connects this steam pipe with the pump that pumps air into the steam chest?
Mr. Pettis: The defendant objects to that question as leading and suggestive, and assuming and not re-direct examination.
Overruled. Exception.

A. Yes sir.

Witness excused.

(At the former trial): 5 o'clock P. M. May 21st, 1913 court adjourned until 9:30 A. M. the following morning May 22nd, 1913.

5:30 P. M. October 16th, 1913. Court adjourned to meet at 9:30 A. M. the following morning, October 17th 1913.

9:30 A. M. October 17th, 1913. Court met pursuant to adjournment, and the following proceedings were had and done.

Mr. Comstock: The plaintiff offers in evidence the deposition of William Hawley, and the stipulation proceeding the testimony.

Mr. Rose: It is stipulated and agreed that Fred Huxoll at the time of the accident in question, was proceeding to his engine, number 1909, for the purpose of moving the engine light, in pursuance to a call of the defendant, from Sidney to Perdue, for the purpose of there connecting with and pulling a train from Perdue to Sidney, and that he was ordered to operate one of the engines which should move said train from Perdue to Sidney. That the train was,—which he was sent to move with the engine 1913, contained goods for continuous shipment between points in one state to points in other states. That the time assigned to said Fred J. Huxoll, for the departure of his said engine, was 11:08 A. M.

352 Mr. Rose: I now offer in evidence, from Exhibit 3, at this trial, rule 875. No objections.

Rule 875 received in evidence and read to the jury and the court and a copy of the same here follows, and is made a part hereof.

"Enginemen.

875. Report for duty at least thirty minutes before the time set for the departure of train; see that fire man is on hand, and remain on duty with engine until it is delivered at the designated place at end of trip, or until properly relieved."

Mr. Rose: The purpose of this stipulation not being to stipulate that Huxoll at the time of the injury or accident was proceeding in the right way or the wrong way. The issue as to that fact being left entirely open not withstanding the stipulation.

That part of the deposition of William Hawley read, appears as follows:

William Hawley appears as a witness in this case in place of the witness G. A. Zentmeyer, who has been subpoenaed and who is temporarily absent from the city. The defendant Company, agreeing to make no objections to his testimony or the exhibits identified by him by reason of the fact that the same was not identified and the foundation laid therefor by the witness G. A. Zentmeyer, who is the chief dispatcher of the defendant, Union Pacific Railroad Company, at North Platte, Nebraska, and was a chief dispatcher on January 1, 1911, it not being intended to preclude the defendant, Company from making any objections to the testimony of the witness Hawley or exhibits identified by him if the objections could be made to the same testimony or exhibits in or attached to the depositions if

given by the witness Zentmeyer in place of the witness
353 Hawley. The defendant Union Pacific Railroad Company having produced the witness Hawley for the purpose of identifying the records in place of the witness Zentmeyer.

WILLIAM HAWLEY, of lawful age, being by me duly examined, cautioned and solemnly sworn as hereinafter certified, deposeth and sayeth as follows:

Q. Give your name to the reporter?
A. William Hawley.
Q. What business are you engaged?
A. Present time I am conductor on the third district and also extra dispatcher.
Q. What position did you hold with the Union Pacific Railroad Company on January 1, 1911?
A. I was night chief dispatcher at North Platte, Nebraska.
Q. Who was the chief dispatcher?
A. Mr. George A. Zentmeyer.
Q. Is he now chief dispatcher?
A. Yes sir.
Q. What department of the Union Pacific Company controls the running of the trains on the third division between North Platte and Sidney?
A. The transportation department.
Q. What office in North Platte, Nebraska?
A. Chief dispatcher has charge of the trains.
Q. How is the movement of the trains kept?
A. Kept on dispatcher's train sheet.
Q. Are these dispatcher's train sheets kept on file at the office of the chief dispatcher at North Platte, Nebraska?
A. Yes sir.
354 Q. Have you got the train sheet schedule for December 31, 1910, and the following night and for the day of January 1, 1911.

Defendant's counsel objects to that question as calling for the conclusion of the witness, no foundation laid, and no knowledge shown.
Overruled. Exception.

A. Yes sir.

Defendant's counsel move to strike out the answer to the last question as a conclusion of the witness, no foundation laid, and no knowledge shown by the witness.
Overruled. Exception.

Q. Will you produce them?
A. Yes sir.—(Produces train sheet.)
Q. How long were you in the service of the Company in the dispatcher's office?
A. Three years.
Q. Does the dispatcher's office at North Platte, Nebraska, control

the operation of all trains in and out of Sydney, Nebraska on the third division?

A. Yes sir.

Q. Do they have control and operation of all trains in and out of North Platte, Nebraska, on the third division?

A. Yes sir?

Q. What if any records are kept in the chief dispatcher's office at North Platte, Nebraska, with reference to the crews upon the different trains, the conductors and engine men?

Defendant's counsel objects to that question as no foundation laid, and calling for the conclusion of the witness, and no knowledge shown.

Overruled. Exception.

A. They are put on the train sheet as they are called, are the only records that I know of.

355 Q. You misunderstood my question a while ago, is there any rule with reference to the turns the engine men are called.

Defendant's counsel objects to that question as immaterial.

Overruled. Exception.

A. Called as near as possible first in first out.

Q. When Huxoll registered at Sidney, at 9:45 P. M. on the evening of December 31, 1910—now if I understood the rule—there were engineers in Sidney who would be called to go out before Huxoll would be called to go out?

Defendant's counsel object to that question as immaterial, leading and assuming facts not proven, and calling for the conclusion of the witness, and incompetent.

Overruled. Exception.

A. Yes sir.

Q. What engine men were there in Sidney at the time that Huxoll reached there with that train, at 9:45 P. M. on December 31st, 1910?

Defendant's counsel objects to that question as immaterial.

Overruled. Exception.

A. Don't think I can tell without the sheet of the 30th. According to this engineer Hogg was last engineer to be called out of Sidney.

Q. Will your records there show who should be called last before Huxoll would be called to go out of Sidney after his arrival there on December 31st, 1910.

Defendant's counsel objects to that question as immaterial. Overruled. Exception.

A. Near as I can tell here would be engineer Moody on this sheet that went in ahead of him.

Defendant's counsel moves to strike out the answer as not responsive to the question.

Overruled. Exception.

356 Q. Will you- records there show who went out of Sidney east after 9.45 P. M. December 31, 1910, up and until 2 o'clock P. M. January 1, 1011?

Defendant's counsel object to that question as immaterial, and no foundation laid, not the best evidence hearsay, and no authority of the alleged record being shown.

Overruled. Exception.

A. Yes sir.

Q. Does the office of the chief dispatcher keep records of the calling of the men at the Sidney terminal?

A. Yes keeps records of the trains leaving the terminals and the crews that go out on them.

Q. What becomes of the books which the call boys have at Sidney?

A. They are not preserved to my knowledge.

Q. Are they sent to your office?

A. No sir.

Q. To the office of the chief dispatcher?

A. No sir.

Q. What records are kept of the calling of the men at the terminals and where are they kept?

A. There is a call stub kept by the round house, but I would not be able to state whether it is preserved.

Q. Who issues the orders for the train crews to leave the Sidney yards to go east?

A. The dispatcher—trick dispatcher.

Q. Is a record kept of them?

A. Yes sir.

Q. Have you a record of the ordering of a double header to leave the Sidney yards to go to Perdu on the morning of January 1, 1911?

A. Yes sir.

357 Q. Will you produce it?

A. Produces record.

Q. In this paper marked dispatcher's train sheet Wyoming Division, Sunday January 1, 1911 the record upon which that is shown?

A. Yes sir.

Q. Where is it shown upon that record?

A. The engines are shown opposite the line for engines and also the helping engine.

Q. Is it this column marked at the head—light to Perdu to get California-special 30—Bailer—account of storm short on water and coal?

A. Yes sir.

Q. Is this the original record in the dispatcher's office showing the ordering of this train to Perdu on January 1, 1911?

Defendant's counsel objects to that question as immaterial, no foundation laid, not the best evidence, hearsay, no authenticity of

the alleged record being shown, and for the further reason that it is leading and calling for the conclusion of the witness.

Overruled. Exception.

A. That is what the train sheet says.

Defendant moves to strike out the answer of the witness, for the reason that the same is not responsive to the question, not the best evidence, and immaterial.

Overruled. Exception.

Q. Which was was the crew going.

A. They were headed toward Sidney, leaving Julesburg.

Q. What is the number of the order which was issued to the office at Sidney for the double header to go to Perdu to get this train?

A. Order No. 36.

Q. Is that found in Exhibit 9?

A. Yes sir.

358 The plaintiff offers in evidence order Number 36, in Exhibit 9, the plaintiff asks leave to read in the record in place of the original and defendant agrees that the same may be read in the record in place of the original.

36-1-1-11 order No. 36-19-c d c ne eng. 1913—56x11:07 A. M. to 19 c q all east 11:08 A. M. eng. 1913 run extra Sidney to Perdu, and run extra Perdu to Sidney has right over all eastern trains Sidney to Perdu—No. 56 Perdu to Sidney.

(The following objection should be just before the last reading, beginning: 36-1-1-11, etc.)

Defendant's counsel objects to the offer as not the best evidence, no foundation laid, immaterial, incompetent, irrelevant, and hearsay.

Overruled. Exception.

Defendant's counsel moves to strike from the record what purports to be a copy of order 36, for the reason that the same is not the best evidence, no foundation laid, hearsay, immaterial, incompetent, irrelevant.

Overruled. Exception.

Q. Are you familiar with what *this* abbreviations stand for and what this means?

A. Yes sir.

Q. You may explain, Mr. Hawley, what the abbreviations mean?

A. 1-1-11—January 1, 1911; 19 c d—form 19 addres- to c d Sidney; c e stands for conductor and engineer; eng—engine; x—reports given by the operator to hold the order until it is completed or reported. 19 form order addressed to c q Chappell; all east means all eastern trains.

Q. Now Mr. Hawley you may state what that order means in good English?

359 A. Well, it gives engine 1913 the authority to run from Sydney to Perdu and return to Sidney.

Q. Now is that correct for Engine No. 56?

A. Yes sir.

Q. What does this mean, 56 Perdu to Sidney?

A. 56 is regular train which has right over extra, and in order to get the extra back to Sydney we would get them to move 56 on.

Q. The only engine number on the train order is 1913?

A. Yes sir.

Q. Do you issue the orders as to what engines are to be taken out of Sidney for each train that is to be moved?

A. The orders are given to the head engine and the head engine is mentioned in the order given to both.

Q. Did the engineers have regular engines at that time?

A. I believe they did but the circumstances didn't allow them to be on their engines very long on account of the weather.

Q. What engine did Huxoll have from Julesburg to Sidney the night before?

A. Engine No. 1698.

Q. Have you a record on your train sheets as to this train arriving at Perdu which this double header was called to relieve and take to Sidney?

Defendant's counsel objects to that question as calling for the conclusion of the witness, and assuming a state of facts not proven. Overruled. Exception.

A. Yes sir.

Q. Of what date is it found on the train sheet?

Defendant's counsel excepts and objects to the question as immaterial, and not the best evidence, and moves to strike out the answer thereto as immaterial and not the best evidence and the answer thereto shows it was referring to a past occurrence.

360 Sustained. Exception.

Q. Under what column is that found—what is the heading of the column?

Defendant's counsel excepts and objects to that question for the reason there is no foundation laid for the use of the alleged train sheet itself, and it is not the best evidence, and hearsay, and the defendant moves to strike out the answer for the same reason. Sustained. Exception.

Q. I will ask the notary to make the train sheet headed December 31, 1910 as Exhibit 7, and train sheet of January 1, 1911, as Exhibit 10—train sheet of December 30, 1910 as Exhibit 11, and the same in the record in place of the original. The same as to read

Q. Is the column which you just referred to the column found on Exhibit 7?

A. Yes sir.

The plaintiff offers from Exhibit 7 the column just identified by witness as California special 30 and asks the witness to read the same in the record in place of the original. The same as so read as a part of the answer of the witness defendant consents shall be

considered of same force and effects as the portion of the original exhibit from which the same is read.

Defendants counsel objects to the offer of Exhibit 7 and moves to strike the same from the deposition for the reason there is no foundation laid and not the best evidence, hearsay, and incompetent, irrelevant and immaterial.

Overruled. Exception.

Heading—California special 30; train No. 453 3rd 53 and extra is opposite column of train. Opposite column of conductor—Bailer; opposite column of engine—315; opposite engineer—W. Brown; opposite column arrived—1867 Atkinson called 5:30 P. M. left 6:05 P. M. with 38 loads 1345 tons; passed Cordwood at
361 6:25 P. M. arrived at O'Fallons 7:49; left O'Fallons 7:53 P. M. passed Dexter 8:17 P. M. arrived at Corda 9:58 P. M. left Corda 10:55 P. M. arrived at Ogallala 10:30 P. M. left Ogallala 10:30 P. M. passed McGrath 1:23 A. M. arrived at Barton 1:59 A. M. left Barton at 2:55 A. M. arrived at Julesburg at 3:25 A. M. left Julesburg at 3:45 A. M. arrived at Chappell 5:35 A. M. left Chappell 5:55 A. M. arrived at Perdu 6:28 A. M. Leaving time of Perdu is not shown as operator was off duty at 7 o'clock in the morning, arrived at Lodge Pole 10:02 A. M. left Lodge Pole 10:11 A. M. passed Colton 10:35 A. M. arrived at Sidney 10:50 A. M. with no cars.

The note at the bottom of the column 1 fish 37 manifest set out train at Perdu account storm froze up and short of water and coal.

Q. Now Mr. Hawley what does that 37 manifest mean?

A. 37 loads of expedite freight?

Q. What does it mean by expedite freight?

Defendant's counsel objects to that question for the reason there is no foundation laid, and incompetent.

Overruled. Exception.

A. Preferred freight.

Q. Is that freight bound for different states?

Defendant's counsel objects to that question as leading and calling for the conclusion of the witness and no foundation laid.

Overruled. Exception.

A. Yes sir.

Q. When you say 37 loads of manifest freight does that mean local freight in Nebraska?

Defendant's counsel objects to that question as leading calling for the conclusion of the witness, and no foundation laid.

Overruled. Exception.

362 A. No sir, not necessarily.

Q. Have you any records in your office or the office of the dispatcher at North Platte or under the control of the dispatcher showing what those 37 loads of manifest freight were?

A. Yes sir.

Q. Will you produce it?

Defendant's counsel excepts and objects to the question in so far as it undertakes to defin*d* Exhibit 12, as leading, no foundation laid, and incompetent, irrelevant and immaterial.
Overruled. Exception.

A. Is Exhibit 12, which you just produced the record in your office showing the contents of this train just referred to?
A. Yes sir.

Plaintiff offers in evidence plaintiff's exhibit 12, and asks leave to supply a copy and a copy may be supplied with the same force and effect as the original exhibit.

Defendant's counsel objects to the offer as no foundation laid, hearsay, and immaterial, irrelevant and incompetent.
Overruled. Exception.

(Copy of copy attached to Deposition.)

EXHIBIT No. 12.

F. A. S. V..... *Ofallons* 12-31-10
G. A. Z.

North Platte.

4th. No. 53 left at 6:05 P. M. Has:

1 Soap	Salt Lake
1 fish	San Fran.
1 crax	Salt Lake
1 steel	"
1 mdse	"
1 doors	Lehi

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1 steel	Los Angeles
3 mdse	Ogden
1 mdse	Los Angeles
1 mdse	Salt Lake
1 mdse	Ogden
1 mattress	Los Angeles
1 H. H. Gds	San Bernardino
1 whiskey	Salt Lake
1 autos	San Fran.
4 rails	"
1 mdse	Saxto
1 incbtrs	Oakland
1 iron	Sacto
1 cans	Oakland
1 T Plate	San Fran.
1 Pipe	Fellows
1 buggies	Los Angeles

1 mdse	Saxto
1 mdse	San Fran.
1 mdse	Sacto
1 pipr	Oakland
1 T Plate	Melrose
1 ir-n	Vallejo
1 pipe	Los Angeles
1 W. Barro-s	Sa*b* Fran.
1 mdse	Sidney
1 mdse	Cheyenne
38 loads	1345 tons

Bailar, 9 P. M.

364 Q. As I understand this record does it mean that the train crew detached the train from the engine and went into Sidney light?

A. Yes sir.

Q. Now you may show where the record is shown about that train going to Sidney?

A. Exhibit 10.

Q. That is the train sheet of January 1, 1911?

A. Yes sir.

Q. What column is it?

A. The column has writing on the left. (Indicating)

Q. Headed what?

Defendant's counsel objects to that question as not the best evidence.

Overruled. Exception.

A. California special.

Defendant's counsel objects to that and moves to strike out the answer to the question as no foundation laid, for the witness testifying from the alleged record or for the use of the alleged record itself.

Overruled. Exception.

The Plaintiff offers in evidence from Exhibit 10 the column headed California 30 and asks the witness to read it in the record. The reading of it in the record may be considered as the same force and effect as a part of the original exhibit offered.

Heading California 30 east special 31; column opposite train—Extra; Opposite conductor—Fletcher; opposite engine—1913; opposite engineer—Hinkel; shows leaving Perdu—no time shown no operator on duty arrived at Lodge Pole 4:23 P. M. left at 4:34 P. M.; arrived at Colton 5:15 P. M. left 5:50 P. M. arrived at Sidney 6:20 P. M.—38 loads 1345 ton.

Defendant's counsel excepts and objects to the offer of Exhibit 10 as above, and moves to strike the same from the deposition
365 for the reason there is no foundation laid for the introduction of the exhibit, not the best evidence and immaterial, incompetent and irrelevant.

Overruled. Exception.

Q. Now is that the return of the crew that just left Sidney with Fletcher Conductor?

A. Yes sir.

Q. It is shown also on the same exhibit 10 the train sheet of January 1, 1911 under the heading light to Perdu to get special—California special?

Defendant's counsel objects to that question as assuming something not proven, and as being an attempt to put into the record a purported portion or an alleged record, and no foundation laid, or having been laid for the use of the record itself.

Sustained. Exception.

Q. You may look at your train sheets and ascertain when the engineer Armstrong and Hinkle arrived at Sidney with reference to the engineers Huxoll and Orten?

A. Engineer Armstrong arriving is not shown at Sidney.

Q. When did Armstrong arrive at Sidney from the east as near as you can tell?

A. He passed Colton 9:19 A. M. on January 1, about a thirty minutes run about 9:50 A. M.

Q. When did Hinkle get there?

A. Hinkle arrived at Sidney at 10:30 A. M. on January 1st.

Q. Were any orders issued for the use of any other engines to go down to Perdu to get this train, other than the first order issued for 1913, and its helper?

366 A. No record on train sheet of any other engine.

Q. Did your dispatcher's office receive any report or record from Sidney with reference to the Huxoll accident at the time?

A. I believe so.

Q. After you received this report were there any other orders issued with reference to this train at Perdu?

A. Not that I know of.

Q. Is the report which you received of this accident an official record of the office?

A. I could not say there is nothing on record.

Q. Have you any record with you?

A. No, I have not.

Q. Have you any record here that shows what engine Huxoll was going out on at the time of the accident?

A. No sir.

Q. What engine he intended to go out on?

A. No Sir.

Q. Have you any record here in the office or has the dispatcher's office any record with referenec to him being called that morning to go out?

A. No sir, I don't believe they have.

Q. You say you don't believe they have, I want to know?

A. No record here.

Q. Where would that record be found?

A. If any be found at Sidney.

Q. In whose charge or custody?

A. Either the agent or round house foreman.

367 Q. Who is the round house foreman?

A. Mr. Nicholson.

Q. Have you any records of any order having been issued with reference to the storm and the steam in the Sidney yards on January 1, 1911?

A. I have none with me.

Q. Has the office any records here?

A. I could not say, it would be in the slow order book if there were any.

Q. Handing you the plaintiff's exhibit 6, I will ask you if that is one of the orders which was issued by the Union Pacific Railroad Company on January 1, 1911, and delivered to its men with reference to the Sidney? Nebraska yards?

A. I could not say until I looked it up.

Q. I will ask you to examine your books and records and produce the orders which have been issued with reference to the Sidney yards and the operatiin of trains on January 1, 1911. Do you find an order issued by the Union Pacific Railroad Company on January 1, 1911, with reference to the Sidney yards?

A. No sir.

Q. Do you find any order with reference to the operation of trains with reference to the Sidney yards on January 1, 1911?

A. No sir. There is one for January 2nd.

Q. What order do you find for January 2nd?

A. Order No. 206.

Q. Where is that order found?

A. In slow order book.

Q. Have you that book with you?

A. Yes sir.

Q. Is this book in which this order is given the regular slow order bo-k that was in use by the railroad company at that time?

368 A. Yes sir.

Q. Under whose supervision was the orders made in that book?

A. Chief dispatcher.

Q. Is that one of the official records in the chief dispatcher's office?

A. Yes sir.

Q. Do you find in that book the original order of which Exhibit 6 is a copy?

A. Yes, but not the same date.

Q. Is the page marked Exhibit 13 the original order issued with reference to the operatio nof trains of the Sidney yards?

A. Yes sir.

Q. What date is that as shown there?

A. January 2, 1911.

Q. January 2, 1911 is at the head of the page is it?

A. Yes sir.

Q. Is it order 206 marked there?
A. Yes sir.
Q. Who sends those orders out from chief dispatcher's office at North Platte and to whom sent?
A. Trick dispatcher on duty—sent to all concerned.
Q. Sent to all station agents to tell the men?
A. Not necessarily just to those concerned.
Q. After they are sent out are they delivered in form of Exhibit 6 to the men?
A. Yes sir.
Q. It appearing that exhibit 6 is dated January 1st, and was delivered at around about 8:37 P. M. January 1st, I will ask if there might not be a mistake in this exhibit 13, as to the date at the top?

369 A. I could not say.
Q. You do not know?
A. No sir.

The plaintiff offers in evidence Exhibit 13, and asks that the witness read the same in the record. The reading of the exhibit in the record may be considered as the same force and effect as the original exhibit were attached to the depositions. Defendant's counsel objects to the offer of Exhibit 13 as immaterial irrelevant and incompetent, and being issued after the hour of the accident, no foundation laid for its introduction, or for the introduction of the original of which it purpost to be a copy and no authenticity shown.

Sustained. Exception.

(Copy of exhibit offered as follows:)

1-2-11—206—19 j b c & e all west see 8:37 P. M. Approach Sidney station carefully and look out for steam from round house blowing across tracks obstructing view.

Q. I will ask you Mr. Hawley if there was any freight trains that were being run upon the Union Pacific Railroad between North Platte and Sidney on January 1, 1911, and prior thereto and for sometime thereafter which did not contain freight bound for other states then Nebraska?

Defendant's counsel objects to that question as no foundation laid, assuming a state of facts not proven.

Overruled. Exception.

A. I could not say for sure.
Q. I wish you would get the manifests or records of your office, first as to the freight conditions upon the trains that were run upon the Union Pacific Railroad between North Platte and Sidney for December 31, 1910 and January 1, 1911 and ascertain

370 whether or not there were any trains being run on the third division in Nebraska on those dates that did not contain freight that was bound to points other than those within the state of Nebraska?

Defendant's counsel objects to that question as assuming a state

of facts not proven, no foundation laid, no authenticity of the alleged manifests or records shown, incompetent, irrelevant and immaterial.

Sustained. Exception.

What trains were there that contained freight exclusively for Nebraska?

Defendant's counsel objects to that question as assuming, no foundation laid, no knowledge shown in the witness, and calling for the conclusion of the witness.

Sustained. Exception.

Q. The branch train to Northport, Nebraska?

A. Yes sir.

Q. None on the main line from North Platte to Sidney?

Defendant's counsel objects to that question as leading and suggestive, calling for the conclusion of the witness, no knowledge shown in the witness, incompetent and immaterial.

Sustained. Exception.

Cross examination by E. C. Crocker:

Q. Of all the freight that was carried on the trains between North Platte and Sidney on those dates did any consist of freight bound from places in Nebraska to parts in other states?

A. No, not all of it.

Defendant's counsel moves to strike out the answer as not responsive to the question.

Overruled. Exception.

371 Q. Didn't all consist of freight bound from points in Nebraska in any one train?

A. No sir.

Q. All the trains run on the third division on December 31, 1910 and January 1, 1911 did not consist entirely of freight running to points in the state of Nebraska?

A. No sir.

Q. Any of freight contained in any one train run on the third division on either of those dates were bound to other points than points of Nebraska?

A. One train.

Q. What train was that?

A. Train 55 the 31st but can't say where it comes from.

Q. Can you tell where the freight on any of the trains came from.

A. No sir.

Q. Your records do not show where the freight came from?

A. No sir.

Q. Expedite freight may be either freight bound between points of the State of Nebraska or between places outside of the State of Nebraska and points in the State of Nebraska?

A. Yes sir.

Q. Was that the condition December 31, 1910, and January 1, 1911?

A. Yes sir.

Q. Do the train sheets all show the order in which the engine crews go into Sidney and the order which they go out?

A. Do on third district.

Q. In case of Mr. Armstrong, I take it here that the train sheet does not show it?

A. Should but it doesn't.

372 Q. Well it does not always show it?

A. No sir.

Q. You produced here I take it Mr. Hawley all the records asked for that you were able to find?

A. Yes sir.

Redirect examination by Mr. Hoagland:

Q. You have no other records with reference to the movement of trains in the third district on December 31, 1910 and January 1, 1911 at the time referred to than what you produced here?

A. Nothing that I know of.

Q. The dispatcher's office had no other records with reference to the crews at Sidney and the operation and calling of them as to which crews went out and who were called than what you have produced here?

A. No sir.

(Adjourned.)

The witness Hawley recalled.

Q. Mr. Hawley have you made a search and found other records in the office of the dispatcher at North Platte with reference to the movement of trains in Sidney, Nebraska on January 1, 1911 and December 31, 1910?

A. Yes sir.

Q. What record have you found?

A. I found the train register of that date.

Q. Have you that with you?

A. Yes sir, I have.

Q. Is exhibit 14 that book?

A. Yes sir.

Q. Where did the chief dispatcher get that book and how did it get to North Platte?

A. It was found on file at Sidney and sent to North Platte by someone there and was just received this afternoon.

373 Q. Was it sent here at your directions?

A. Yes sir.

Q. Is this Exhibit 14 one of the official train registers that was in use by the agent defendant, Union Pacific Railroad Company at Sidney, Nebraska on December 31, 1910 and January 1, 1911?

A. Yes sir.

Q. I wish you would turn to the page in the register in Exhibit

14, showing the registering of engineers into the Sidney, Nebraska station on December 30, 1910 and the 31st 1910?

(Indicates.)

I will ask the notary to mark exhibit 15 the page designated by the witness as the register referred to for December 30, and Exhibit 16 the page of the register referred to December 31, and it is so marked.

The plaintiff offers in evidence Exhibits 15 and 16 asking leave to supply a copy. The defendant will make no objections that they are copies in place of the original.

(Copies hereto attached.)

Q. I wish you would designate the page on this register showing the engineers that came into Sidney on January 1, 1911?

(Indicating.)

Q. I will ask the notary to mark that portion of the register showing the engineers that came into Sidney on January 1, 1911? as Exhibit 17?

Plaintiff offers in evidence exhibit 17, and asks leave to supply a copy. The defendant will make no objection that exhibit 17 be copied instead of the original being attached to the deposition.

Q. Will you designate the page in this register showing the registering of engineers going east out of the Sidney yards on December 31, 190?

A. (Witness designates.)

374 Q. I will ask the notary to mark the page designated by the witness as Exhibit 18.

Plaintiff offers in evidence Exhibit 18 and asks leave to supply a copy. The defendant agrees that a copy may be supplied with the same force and effect as original exhibit.

(Copies of Exhibits 17 and 18 attached.)

Q. Will you designate the page of the registering Exhibit 14 showing the registering out of engineers their turns out of Sidney east on January 1, 1911?

A. (Witness designates.)

Q. I will ask the notary to mark the page designated by the witness as Exhibit 19.

Plaintiff offers in evidence eshibit 19 and asks leave to supply a copy. The defendant agrees that a copy may be supplied with the same force and effect as the original exhibit.

(Copy of Exhibit 19 attached hereto.)

Q. Now Mr. Hawley can you take Exhibit 14, and show what engineers were in Sidney at 9:45 P. M. December 31, 1910 after Mr. Huxoll arrived there—that is, engineers on the third division in Nebraska?

A. I think so—yes.

Q. You may take the exhibit and state what freight engineers were in Sidney at 9:45 P. M. December 31, 1910 belonging to the third division of Nebraska?

A. I don't know about that as there are engineers that left Sidney that is not shown—dead heads.

Q. Do you mean to say that this register does not show all the engineers who were in Sidney and went out?

A. It does not show all the engineers who went out. It shows all the engineers who go in Sidney from here.

Q. It will show all that went out except those who dead headed out?

375 A. Yes sir.

Q. And you testified that two crews dead headed out?

A. Yes sir.

Q. What other engineers besides the two that were dead heading out were in Sidney at the time Mr. Huxoll arrived there at 9:45 P. M. December 31, 1910?

A. The register shows engine 1920 with engineer Bowersox.

Q. Was he the last engineer that left there before Huxoll arrived?

A. Yes sir.

Q. What other engineers left Sidney east bound after that time and prior to 11 A. M. January 1, 1911?

A. Bowersox at that time was not in regular road service—that is he was not considered first out as he was on relief crew and the train he went on had a dead head engineer—dead heading out until his eight hours rest was up and took charge at that time.

Q. Who was that engineer who dead headed out?

A. Engineer Hogg.

Q. Who were the engineers in the Sidney yards that left Sidney east bound after engineer Hogg left at that time and prior to 11 A. M. January 1st—give them in their order: I am referring to freight engineers only?

A. There were none except those that dead headed out.

Q. Who dead headed out?

A. Can't recall it now.

Q. Now will you refer to the train register and show when engineer Armstrong who went out on 1913 with Conductor Fletcher arrived in Sidney?

A. Train register does not show Armstrong arriving, he may have dead headed.

Q. Now if the engineer takes a train into a station, he is registered in?

376 A. Yes sir.

Q. What other methods are there to get in?

A. Well he may dead head in on any train.

Q. When did engineer Hinkle get into Sidney the engineer who also went out with Fletcher?

A. He arrived at Sidney 10 A. M. December 31, 1910.

Q. Was he a regular engineer?

A. I could not say at that time.

Recross-examination by E. C. Crocker:

Q. First in and first out applied only to regular engineers?
A. Yes sir.
Q. Now, it didn't apply to men working extra?
A. No sir.
Q. Some at that time on the division was working extra?
A. Yes sir.
Q. It would be impossible to tell from the train register the order of the engineers in and out?
A. Yes sir.
Q. And would also be impossible to tell from the train sheets?
A. Yes sir.
Q. In fact there is no record in existence now by which that could be shown?
A. I don't believe so.
Q. Some of those engineers that are shown upon this train register that you have referred to and the pages that are marked exhibits may be extra engineers?
A. Yes sir.
Q. And they are not subject to rule first in first out?
A. No sir.
Q. Would they or not be subject to rule first in and first out?
A. They would not.
377 Q. So it would be impossible to tell the turn men are called by this train register?
A. Yes sir.
Q. You could not tell it from train register?
A. No.
Q. Could not be told from train sheets?
A. No sir, it could not.
Q. Could not be told from train sheets or register together?
A. No sir.

Redirect examination by W. V. Hoagland:

Q. From what record can it be told whose turn it was to be called at 11 o'clock in the morning for this double header train east with Fletcher as conductor.
A. Nothing that I know of.
Q. Who keeps track of the turns of the engineers?
A. The round house foreman.
Q. At Sidney?
A. Yes.
Q. Does he keep a record of that?
A. I could not say for sure.
Q. Do the engineers register in and out at the round house?
A. I believe they do I would not say for sure.
Q. From whom does the call boy get his directions as to who to call?
A. Roundhouse foreman.

Q. What records or where would that be that showed Huxoll and Orten were called to go with Fletcher on that double header east?
A. If any they would be at Sidney.
Q. In whose custody?
A. Mr. Nicholson—round house foreman.
Q. Assuming that engineers Thomas Orten and Fred Huxoll were called that morning to go with conductor Fletcher to Perdu to get the train testified to by you, what explanation have you got for
378 not appearing in the train register?
A. I could not say unless the engineers did not register.
Q. When do the engineers register?
A. At different times; no two register alike. Some register before they get their engines and some afterwards.

Recross-examination by E. C. Crocker:

Q. Now if I understand you, you don't know whether there are any registers kept by the round house foreman or not?
A. No sir.
Q. May and may not?
A. May.
Q. Register is not in your custody?
A. No sir.
Q. Not in the custody of dispatcher at North Platte?
A. No sir.
Q. Or under the control of the dispatcher's office at North Platte?
A. No sir.
Q. It is not under the control of the dispatcher's office at North Platte, Nebraska?
A. Is not.

Redirect-examination by W. B. Hoagland:

Q. Is this register exhibit 14, the only register kept by the agent at Sidney with reference to trains?
A. Yes sir.
Q. At that time?
A. There is a federal register kept of the train crews that is sent to the government every two or three days.
Q. That is not in the Company's custody at this time?
A. No sir.
Q. This is the only register in the custody of the Company that you know of excepting perhaps the register at the round house?
379 A. Yes sir.
Q. When you sent to Sidney for this record, did you send for round house record?
A. No sir.
Q. Call book?
A. No sir.

Recross-examination by E. C. Crocker:

Q. It is not under control of dispatcher office?
A. No sir.
Q. This train register which you produced as I understand you did not have it at the time the adjournment before supper—you had not gotten it at that time?
A. No sir.
Q. You at that time forgot that you had sent for it?
A. Yes sir.
Q. That train register that you produced here since supper was that kept by the dispatcher?
A. Kept by agents at Sidney.
Q. Did you ever see it before until you saw it this afternoon?
A. No sir.
Q. The dispatchers at North Platte would not know whether that train register was correct or not?
A. No sir.
Q. You don't know whether it is correct or not?
A. I don't know.

Redirect-examination by W. V. Hoagland:

Q. You sent for that book at whose request?
A. I wanted to get all the records I could.

380 The counsel for plaintiff demands that the defendant return this register marked Exhibit 14 to Sidney and have it there for the examination of the agent on December 31, 1912, under the notice to take depositions which have been served this day as plaintiff desires to examine witnesses with reference to said exhibit 14.

(Signed) WILLIAM HAWLEY.

Subscribed and sworn to before me this 31st day of December, 1912.

W. K. LOWE, *Notary Public.*

(End of this deposition.)

Mr. Hoagland: (At the trial.) Plaintiff offers in evidence the deposition of Arthur Devine.
(Reads as follows:)

ARTHUR DEVINE, being first duly cautioned, examined and solemnly sworn, deposes and says as follows:

Q. State your name, age, residence and occupation?
A. Arthur Devine, residence Sidney, occupation locomotive hostler, 56 years.
Q. For the Union Pacific?
A. Yes sir.
Q. Were you day hostler for the company on January 1, 1911?
A. Yes sir.

Q. Were you acquainted with Fred Huxoll?
A. Yes sir.
Q. Did you take his engine out of the round house that morning for him?
A. No sir.
381 Q. Who did?
A. I could not say.
Q. What are your duties as hostler?
A. To take the engines, generally out of the house, but we were very busy that morning and it was impossible for me to handle them all, and the foreman took some out.
Q. Where were you at the time of the accident?
A. I was on an engine taking it out of the house. I had taken the engine out of the house and had gone across the turn table, and was on the spot track going west.
Q. Did you hear the accident?
A. No sir.
Q. Did you see the switch engine coming up the track?
A. No sir.
Q. How far were you from the main line track at that time?
A. I was in the neighborhood of—or I was on the spot track, and that wasn't over twenty-five feet or thirty feet from the main line, maybe not that far.
Q. How fast were you going?
A. Two or three miles an hour. It was so foggy and steamy I was using my own judgment.
Q. Were you operating your engine at that time in conformity to a rule of the company with reference to operation of engines in foggy and stormy weather in the yards?

Objected to as immaterial, irrelevant and incompetent.
Sustained. Exception.

Mr. Hoagland: (At the time of the second trial of this case.) Plaintiff offers the answer to the question as follows:
A. I was moving slowly.
Q. And how close did you get to the engine that Orton was on?
A. In the neighborhood of maybe twenty-five feet.
382 Q. How did you come to hear of the accident?
A. The accident happened. When I got up to where they were, I noticed they stood there and I could see a hand across the rail.
Q. When you got up to where the accident was?
A. Yes sir.
Q. How did you know there was an accident?
A. I saw a hand under the driver.
Q. How close were you to it?
A. Six, eight, ten or twelve feet.
Q. The first you noticed you happened to see the hand under the driver?
A. Yes sir.
Q. Was there anybody standing around the engine?

A. Nobody standing around there.
Q. Did you know Mr. Dupont?
A. No sir, I did not.
Q. Did you see the switch engine moving at all?
A. No sir.
Q. How far was this point from the water crane?
A. I should judge it to be thirty or forty feet, or maybe further.
Q. Where you say the hand?
A. In the neighborhood of seventy or ninety-five feet.
Q. Is it your duties as hostler to take the engines down to the water crane and fill them?
A. Yes sir.
Q. Had you filled the Orton engine?
A. No sir, neither of them.
Q. Had you been down around the water crane that morning?
A. No sir, I had not.
Q. Was you there the evening before?
A. Yes sir.

Objected to as immaterial.

383 Sustained. Exception.

Mr. Hoagland: (At the time of the second trial of this case.) The plaintiff offers the answer to the question as follows:

A. There was some ice around there, but not a great deal.
Q. How far did it extend from the crane?
A. Not over a couple of feet.
Q. On both sides?
A. It might have extended out five feet on the side where the arm was swung.
Q. Did you help them there at the accident?
A. No sir.
Q. You did not help them there at all?
A. No sir, I did not, I got off the engine and I met Roscoe Zimmer at the tank, and he said Huxoll was under the engine.
Q. Do you know anything else about the accident?
A. No sir.

(This is all of this deposition that was read.)

ERNEST T. TRAMP, called as a witness on behalf of the plaintiff, testified as follows, upon examination.

By Mr. Rose:

Q. What is your name?
A. Ernest T. Tramp.
Q. Where do you live?
A. North Platte, Nebraska.
Q. What if any relation do you sustain to the plaintiff, Mr. Tramp?
A. I am her uncle by marriage.
Q. That is to say, Mr. Huxoll was your nephew?

A. Yes sir.
Q. What is your business?
A. I am in the mercantile business.
384 Q. What kind of a store do you have?
A. Dry goods store, and groceries.
Q. How long have you been in that business?
A. Not quite 13 years.
Q. How long had you known Fred Huxoll, prior to his death?
A. I knew him all his life.
Q. What was the degree of your acquaintance, how intimate were you with him?
A. Very intimate.
Q. Did he ever work for you?
A. Yes sir.
Q. In what capacity?
A. He worked for me in the store.
Q. Were you acquainted with what sort of an education he had and what his ability to read and write and keep books was?
A. Yes sir.
Q. You may describe in a general way what his education was?
A. He had a good education. He was a good penman, and was good in figures and accurate.
Q. Was he keeping books for you?
A. Not for me, only in a general way.
Q. Do you know what his qualifications were?
A. He was a good book keeper.
Q. Had he ever kept any store for himself?
A. Yes sir.
Q. What kind of a store did he have himself?
A. A confectionery and cigar store.
Q. How old was he when he was in those pursuits?
A. Perhaps twenty-three or twenty-four years old.
385 Q. He was married about the time he was twenty-four, wasn't he?
A. Well, I could not say, I presume somewheres along there.
Q. Do you know from his service with you, what aptitude, if any he had about attracting trade he had?
A. Yes sir, he was well liked by the customers.
Q. Do you know what his habits were as to sobriety and steadiness, and if so, you may state?
A. He was a man of excellent character, and sober and industrious.
Q. What was your occupation before you went into the mercantile line?
A. I worked for the Union Pacific Railroad.
Q. Worked for the Union Pacific Railroad?
A. Yes sir.
Q. How long did you work for the U. P.?
A. About 6 years.
Q. What was the particular nature of employment, and what were your duties with the Union Pacific?

A. I was employed in the tin shop at North Platte, and then transferred to the round house as stack inspector nights.

Q. And did that have anything to do with engines,—what was the duty of the stack inspector?

A. My duty was to inspect the netting in the stacks, the front end of the engine, the netting in the ash pan, and all pipes on an engine, and all the sheet iron.

Q. And how long were you employed as inspector in that particular work at North Platte?

A. About four years.

Q. Were you acquainted with the type of engines that they used at the time, in a general way?

A. In a general way, yes sir.

386 Q. And the type of engines they used in the latter part of 1910?

A. Yes sir, in a general way.

Q. Were you acquainted in a general way with the air braking device?

A. Yes sir.

Q. Were the engines equipped with an air braking device, when you were inspector?

A. Yes sir.

Q. What if anything did you have to do with inspecting those devices?

A. I had to inspect all the pipes on an engine.

Q. How was the air pressure obtained in an air braking device?

A. It is pumped by the air pump.

Q. Air pump?

A. Air pump with steam.

Q. What kind of a reservoir do they have to contain it, in order to get the pressure?

A. What kind of a reservoir?

Q. Yes sir.

A. A large sheet ir-n, or cast iron tank, for a reservoir.

Q. It has some sort of an iron vessel or container, that will withstand how much pressure?

A. Fifty or sixty pounds.

Q. And what was the air used for?

A. To apply the brakes.

Q. And those air brakes were in use at the time you were inspector were they?

A. Yes sir.

Q. Do you know at that time how the brakes were operated?

A. In a general way.

Q. Did you have anything to do with the machinery that operated the bells automatically?

A. No sir, other than looking after the pipes.

Q. Well, did you have to look after the pipes?

387 A. Yes sir.

Q. Do you know what kind of power was used for that air, or steam?

A. Well, the ones in use at that time, were air.

Q. Well, in either case,—do you know what appliance the U. P. used in 1910, what sort of power for the automatic bell ringers.

A. No, I am not familiar with the appliances of today.

Q. And how was the pressure obtained, and retained and kept up, where they do use compressed air power?

A. By that pump.

Q. Which is operated by what?

A. I do not understand your question.

Q. Well, is that pump operated by steam?

A. Yes sir.

Q. And that compresses the air in the reservoir, or tank?

A. It takes the air by the pipe that is called the main pipe to the reservoir, and then comes back by what we call the return pipe.

Q. Now are you familiar with and were you familiar in December 1910, and January 1911, as to how if at all, extremely cold weather affects the operation of the steam pumps that are used to compress air in the reservoirs of such engines?

Mr. Strode: The defendant objects to that question as no proper and sufficient foundation laid.

The Court: You may answer "yes" or "no."

Defendant excepts.

A. Yes sir.

Q. And had you had any previous experience, in ascertaining how extremely cold weather does affect the steam pumps, that were used to compress the air in the reservoir?

A. The cold weather does not exactly affect the steam pump.

Q. Well, its operation?

A. Yes sir.

Q. And have you had experience in that manner?

388 A. Yes sir.

Q. Now what has been your duties that gave you such experience,—what particular work were you doing from which you derived that knowledge?

A. In my work which was night,—I have been nights as a rule more than day times, I have had several experiences with frozen air pipes on engines.

Q. And what did you do with them?

A. If they were not too badly frozen, I would try and thaw them out outside, when I was told they were frozen.

Q. What means did you take to do that?

A. As a rule, I would first try a torch, and see how far that would thaw them out, and if they were frozen to any extent at all, I would order the engine brought in the house and then I would take a hose with steam and hot water, and thaw them out.

Q. Now I want to ask you if ordinarily the steam pumps that are used to compress the air in the reservoirs are operated constantly, and whether or not they could be operated constantly?

A. No sir, there is a governor that shuts off the working of the pump when it receives certain pressure.

Q. And when that is shut off, how does that affect the supply of hot steam to the pipes beyond the valve at which it is shut off?

A. That as a rule is the time when it freezes.

Q. Well, how does it affect the supply, is there any supply after it is automatically shut off?

A. No,—there is a supply in the reservoir,——

Q. No, I mean the pipes that lead from the valve to the pump?

A. It is not in operation.

Q. And what if any portion of those pipes is outside of the steam valve that you say is automatically shut off?

A. That pipe leads from the boiler head to the pump and there is part of that pipe exposed to the outside where it connects with
389 the pump, and that part is more subject to being frozen.

Q. Well, the question is, what degree of exposure does that have to heat or cold, or how is its exposure to heat and cold affected at the time it is shut off,—is there any supply of steam to it?

A. No sir.

Cross-examination.

By Mr. Strode:

Q. How many years ago was it, Mr. Tramp, that you quit the service of the Union Pacific Railroad?

A. That has been about 17 years ago.

Q. And at that time do you say that they had automatic bell ringers and automatic brakes on engines, 17 years ago?

A. Yes sir.

Q. And it was your duty to inspect the pipes and not the pumps or the machinery that operated the bell or the machinery that operated the brakes, but that was your duty to inspect the pipes?

A. Yes sir.

Q. And it was your duty to simply see they were not leaking or broken?

A. Yes sir.

Q. And you did that by the naked eye?

A. Well, I could not do it by the naked eye.

Q. Well, you had some way to do it?

A. I would try them by using the pump.

Q. And you were expected to, and did, in that service that you were rendering there, make careful inspection of the pipes from day to day, as those engines came in, didn't you Mr. Tramp?

A. Yes sir.

390 Q. And that at that time, was the custom of the Union Pacific employees who had the discharge of any special duty or inspection to make,—a careful inspection,—wasn't it?

A. Yes sir.

Q. You made careful inspections didn't you?

A. Yes sir.

Q. And other employees who were assigned to such duties made careful inspections, didn't they?

A. Yes sir.

Witness excused.

12 o'clock Noon, Court adjourned until two o'clock P. M. same day, October 17th, 1913.

Two o'clock P. M. October 17th, 1913, court met pursuant to adjournment and the following proceedings were had and done.

Mr. Strode: The defendants offer in evidence Exhibit "7," being Exhibit "6" in the former trial of this case. No objection. Exhibit 7, received in evidence and read to the jury, and a copy of the same is hereto attached and made a part of this record.

Mr. Strode: The defendant offers in evidence Exhibit 8, being Exhibit 5 in the former trial of this case. Received without objection, read to the jury, and a copy of the same or the original is hereto attached, and made a part of this record.

C. E. FINCH, called as a witness on behalf of the plaintiff, was first duly sworn, and testified as follows, upon examination, by Mr. Rose:

Q. What is your name?

A. C. E. Finch.

391 Q. Where do you live?

A. Lincoln, Nebraska.

Q. How long have you lived in Lincoln, Nebraska.

A. 25 or 26 years.

Q. Did you ever pursue the vocation of a locomotive engineer.

A. Yes sir.

Q. What has been the period of your experience in that employment?

A. Off and on, I have railroaded for about 36 years.

Q. How long did you run a locomotive engine?

A. About 21 or 22 years.

Q. During the period of your residence in Lincoln, what road were you employed by?

A. I was on the Burlington.

Q. What was your run here?

A. I pulled most of the runs out of here, but my principle run was north west of here on the Billings passenger.

Q. Between what points?

A. Between Lincoln and Ravenna.

Q. Was that the principle limited passenger train on the Burlington, to the Pacific northwest.

A. Yes sir.

Q. How long did you operate that engine on that passenger run?

A. Oh, altogether I was on that run 18 or 19 years.

Q. Was your engine, or engines that you operated for the Burlington road, equipped with air brakes?

Q. Yes sir.

Q. And automatic bell ringers?

A. Yes sir.

Q. How was the air retained for power,—that furnishes the power for the automatic air brakes?

392 Mr. Strode: We want to object at this point, because up to this point it is not shown that the witness knows anything

about the equipment that is involved in this action. Or air brake equipment on an engine of the style and character of the one involved in this action. Engine, number 213. It is not shown that the equipment on these engines, with respect to the air brakes or an automatic bell ringer, are uniform on all kinds of engines.

Mr. Rose: I will excuse the witness for a few minutes and call Mr. Nicholson to the stand.

Witness excused temporarily.

J. A. NICHOLSON, recalled as a witness on behalf of the plaintiff, was first duly sworn, and testified as follows upon examination,

By Mr. Rose:

Q. Mr. Nicholson, just let me know again what you have to do with the mechanical part of the care of the engine, or the work in the yards at Sidney?

A. I have charge of the round house force and they handle all the repairs on the engine including turning the engines and housing them, and then taking them out and getting them ready for the crews to take out of town.

Q. Can you tell me what is the style and size of engine 213, that was operated January 1st, by engineer Zimmer?

A. It has eight driving wheels and a pair of engine trucks, and it is equipped with a seven thousand gallon Vanderbilt tank.

Q. What braking appliance did it have at that time?

A. New York, Number Five air brake pump. Engineer's brake valve and engineers' straight air valve. And pipes to the air pump and main reservoirs and pipes between the main reservoirs and the air pump, necessary braking rigging and brake cylinders, and also necessary air gauges, and also a pump, throttle, and pump governor.

393 Q. You say it has a New York Air Pump number five?

A. Yes sir.

Q. Is there any other system or name by which it is known?

A. None that I know of. Number five air pump,—that is the number that the manufacturers designate this pump by, and it is made by the New York air brake company.

Q. Do you know what patent is is?

A. No sir.

Q. It wasn't a Westinghouse air pump?

A. No sir.

Q. What is the air compressed in, so as to give pressure?

A. In the main reservoirs.

Q. What is that made of?

A. Steel.

Q. Where is it located?

A. Under the running boards of the locomotive, next to the boiler.

Q. Under the running boards?

A. Yes sir.

Q. They are outside of the boiler?

A. Yes sir.

Q. And exposed to the atmosphere?
A. Yes sir.
Q. Are there any other air cylinders aside from the main air cylinder?
A. Well, there is the main reservoirs and then there is a drive brake cylinder, and the tank brake cylinder and also the auxiliary cylinder. Or the auxiliary reservoir.
Q. Where is the drive brake cylinder located?
A. The,—immediately back of the saddle.
Q. What do you mean by the saddle?
394 A. It is the part that connects the,—the part between the cylinder and the boiler.
Q. Is that exposed to the atmosphere?
A. Yes sir.
Q. Where is the auxiliary cylinder?
A. Under the running board of the engine proper, and under the tank or the tender.
Q. Are they exposed to the atmosphere?
A. Yes sir.
Q. What sort of a bell ringer did that engine have on?
A. An automatic bell ringer.
Q. What sort of power operated it?
A. Air.
Q. Q. And where was the air taken from that operated the bell,—what cylinder?
A. Taken from the main reservoir.
Q. How was the air supplied to these reservoirs?
A. By the air pump.
Q. What sort of power operates the air pumps?
A. Steam.
Q. When the maximum pressure is obtained in the reservoir, is there any automatic device for shutting off the pump valve—the steam valve that operates the pump?
A. Yes sir.
Q. When the pump is not in operation, it is not supplied with hot steam, is it. Well, you may state what the fact is, as to whether,—state whether the operation of the air pump is continuous while the engine is operating or running?
A. No sir, the pump does not run at all times, but the steam is not shut off entirely at any time.
395 Q. Well, do you mean that the valve does not close,—it is not allowed to leak?
A. Yes sir, there is a vent hole for the steam to leak through.
Q. Where is the vent hole?
A. In the governor.
Q. Where is the steam expelled?
A. It is expelled through the exhaust pipe in the pump, into the cylinder saddle, and goes out through the smoke stack.
Q. Does the fact that the engine is still impede the free movement of the steam through the vent pipe into the smoke stack or not?
A. No sir.

Q. Well, why wouldn't the steam go through there then without moving the pump?

A. There is not enough steam there to move the pump.

Q. Well, how would you ever get the pump to move, if there is not enough steam to move the pump?

A. You understand this vent hole is very small, it is not very large.

Q. Do you have any vent or steam into the air pipes?

A. No sir.

Q. What is the weight of this engine 213?

A. A little over 100 tons.

Q. Well how much over,—give approximately its weight, as near as you can?

A. About 207,000 pounds as near as I can remember.

Q. It has eight drive wheels?

A. Yes sir.

Q. That engine came in on the night of December 31, into the yards, didn't it from the road?

A. No sir.

Q. When did it come in?

A. About 5:40 A. M. January 1st.

Q. Was it housed, after it came in?

A. No sir.

396 Q. How long a run had it had?

A. I think it was about seven hours and a half, running from—seven and a half hours running from Cheyenne to Sidney.

Q. Who to-k charge of it immediately after it arrived at five A. M. January 1st?

A. It was turned over to the yard crew.

Q. Immediately?

A. I believe it was.

Q. The night yard crew or day yard crew?

A. Night yard crew.

Q. Did the night yard crew use it?

A. They were on it, but I do not know whether or not they used it.

Q. When did the *d*hift of the night yard crew close?

A. Six o'clock.

Q. Then it was only turned over to them twenty minutes before their shift closed?

A. Yes sir.

Q. Then what was done with it?

A. They day crew used it.

Q. What is that?

A. The day crew used it.

Q. When did the day crew take it?

A. 6 o'clock.

Q. Had it been housed at any time after it came in on this seven and a half hour's run, until the Huxoll accident?

A. No sir.

Q. Then that gives the history of about twelve hours and fifty minutes service, is that right?

A. It would be about 13 hours.
Q. Where had the engine last been housed, in what round house?
A. Cheyenne, I think, I do not know it was in Cheyenne, but she came to Sidney,——
397 Q. What is the distance from Cheyenne to Sidney?
A. 102 miles.
Q. What was the particular class of duty that it had been discharging in coming from Cheyenne to Sidney, what kind of load if any did it have?
A. They pulled a freight train.

Cross examination.

By Mr. Strode:

Q. Then as a matter of fact, Mr. Nicholson, this engine was in constant service from the time it left Cheyenne, if that was the point of the departure, from the round house, until the time of this accident?
A. Yes sir.
Q. Being used in the first instance to pull a train of Freight cars from Cheyenne to Sidney?
A. Yes sir.
Q. Then turned over to one switching crew upon arrival in Sidney, and used by that crew until that crew was relieved by another?
A. Yes sir.
Q. And then operated by a second crew until the time of this accident?
A. Yes sir.
Q. It wasn't sent to the round house or any place for repairs?
A. No sir.
Q. It was in constant service?
A. Yes sir.
Q. If any repairs had been needed, or required, on this engine, when it came in, what would have been done with it?

Mr. Comstock: The plaintiff objects to that question as improper cross examination.
398 Sustained. Exception.

Q. Was this engine at any time sent to the round house or any place in the yards, for repairs, at any time after it reached the yards, as far as you know, up until the time of this Huxoll accident?
A. No sir.
Q. Were any repairs needed on this engine at any time after it reached the yards at Sidney, and was being used in the yards for switching purposes, up to the time of this accident, as far as you know?

Mr. Comstock: The plaintiff objects to that question as improper cross examination.
Sustained. Exception.

Q. Now with reference to the character and style of the automatic

air appliance on this engine,—are these appliances of uniform kind on all engines, that are used on the Union Pacific Railway system, or do they have different kinds and styles and types?

A. Different kinds and styles and types.

Q. Do you know whether there is any difference in the construction of this air appliance or these air appliances on the different engines, that were used in and out of the Sidney yards?

Q. Yes sir, there is some little difference.

Q. How long have you been acquainted in your business and in your employment and service with the different kinds of air appliance that are used on engines in the way of brakes, bell ringers and so forth?

A. 11 years.

Q. You weren't acquainted with them seventeen years back, Mr. Nicholson?

A. No sir.

Q. You can only go back 11 years?

A. Yes sir.

Q. Has there been any change in the kind of air equipment or appliance used on engines in the last 11 years?

A. Yes sir.

399 Q. Has there been any marked change in the type of the air appliance that are used on engines?

A. Yes sir.

Q. They are not built the same or operated the same as they used to be?

A. Well, they are operated the same, but they are built to haul a good deal more tonnage, or cars, and they have some slight changes in the construction.

Q. On these different engines, Mr. Nicholson, there is a point where the air is stored in the reservoir on the engine?

A. Yes sir.

Q. And that is the same as the air in this court room, except it is compressed?

A. Yes sir.

Q. It is just air?

A. Yes sir.

Q. And would compressed air be any more likely to freeze then the air in this court room, would freeze?

Mr. Rose: The plaintiff objects to that question as improper cross examination.

Sustained. Exception.

Q. Did you ever know in your experience of air in the middle or in any part of an air chamber, or in any part of a room, freezing on account of the temperature outside?

Mr. Rose: The plaintiff objects to that question as improper cross examination.

Sustained. Exception.

400 The only point where the air is stored is in an air chamber,—that chamber as I understand you, is located on the side of the boiler?

A. Yes sir.

Q. And how near to the boiler does that air chamber lie?

A. Why the inside of the main reservoir is about 12 or 15 inches from the boiler.

Q. On different engines, is that air chamber located at different points or places on the engine?

A. On different classes of engines, yes sir.

Q. It is not located on all engines at the same place?

A. No sir.

Q. So you would have to know the particular kind of an engine and you would have to know the particular kind of an air appliance, before you could determine where the air chamber be located?

A. Yes sir.

Q. From the air chamber, where is the other point where the air is used,—it goes from the chamber to what point for use?

A. To the engineer's brake.

Q. It either goes to the brake or the bell ringer?

A. That, is independent of the brake.

Q. Well if you were operating the bell ringer, it would go to that point?

A. Yes sir.

Q. And if it goes to the brakes then it is conducted to a point on the engine where it can be used to operate the brakes?

A. Yes sir.

Q. Now are the pipes that conduct the air to the air chamber and the point where the air is used on the brakes, or where the air is used for the bell, are those pipes in size or location on the engine, the same in all instances, and on all engines?

401 A. No sir.

Q. It depends on the particular engine, and on the particular kind of appliance as to the location of those pipes?

A. The particular class of engines.

Q. You have among engines, different classes?

A. Yes sir.

Q. 213; Does that indicate to you anything as to the particular kind of an engine being on the Union Pacific Road?

A. Yes sir.

Q. We have referred here to engine 1913, and I think the Huxoll engine being referred to here is 1909, and then there was another engine referred to as 1606, and another as 1203, now are those the same class of engines?

A. No sir.

Q. Different in equipment and different in appliance in some respects?

A. Yes sir.

Q. And would the air appliance be the same and the location of the reservoir, and these different pipes and the valves and the other details on that appliance be the same on these different engines you have mentioned?

A. The appliance might be the same, but the location would be different.

Q. Do the types of the engines go by,—fall into classes, as 1500 or a 1600, or a 1700 class?

A. Well, they generally start with an even hundred,—sometimes it runs into probably 200.

Q. Well you have a 1600 and then a 1200?

402 A. That is two different classes.

Q. And then the 1900?

A. That is another.

Q. Do the classes go all the way through the 100?

A. They start with an hundred, but sometimes it takes two hundred to get them all. It doesn't always change with the beginning of a new hundred.

Q. Well, would the number two hundred and thirteen, or two hundred, or sixteen hundred and six, or anywhere within the nineteen hundred, or the twelve hundred, on the Union Pacific, correspond in character and style of engine, with the engine on any other road, by the same number?

A. No sir.

Q. They are not uniform in that respect at all?

A. No sir, each road has its own method of numbering their engines.

By Mr. Rose:

Q. I hand you what is called Exhibit 9, and ask you whether you recognize that as a photograph of engine 213, that we have inquired about as it appeared January 1st, 1911?

A. Yes sir, I believe that is the engine.

Mr. Rose: That is all.

Witness excused.

C. E. FINCH, recalled as a witness on behalf of the plaintiff, testified as follows upon examination by Mr. Rose:

Q. Did you hear the testimony just given by Mr. Nicholson?

A. Yes sir.

Q. Did you ever operate the New York Air brake company's brakes·

A. I have.

Q. Assuming that the main reservoir and the drive brake cylinders, and the tank brake cylinder and the auxiliary cyl-

403 inder of the New York Number five air brake pump was attached to Union Pacific Engine, number 213, a photograph of which I hand you, in the positions which you heard the witness Nicholson indicate, you may state whether, when the wind was high, and the temperature was 15 degrees below zero, the exposure of those resorvoirs and air cylinders to the atmosphere could effect the free operation of the air brakes?

Mr. Strode: The defendant objects to the question as assuming facts not in evidence and not shown to be in evidence here, and not in evidence, and for that reason would be incompetent, and for the further reason that no proper and sufficient foundation is laid for this question, and the witness not shown to be competent to

answer the question, and for the further reason that the evidence offered, shows that the air appliance for the brakes and bell ringer, on these different engines, is different in character, depending upon the style of the engine, and different in the matter of location of the pipes and valves, and other details of the equipment, none of which details are given to the witness in the hypothetical question and for the further reason that the hypothetical question assumes that the witness should take into account the testimony of a witness without detailing or setting out in the hypothetical question, the facts which the witness is asked to take into account in answering the question.

The Court: As the hypothetical question suggests to the witness, that taking into consideration the testimony of Mr. Nicholson, who proceeded the witness on the stand, and assuming that, as part of the hypothetical question, in the matter of the witness giving his opinion, overruled. Exception.

Mr. Strode: I would like to examine the witness as to his qualifications to answer that question.

The Court: As to foundation, you may.

By Mr. Strode:

404 Q. You never operated an engine such as the one that is shown you there in that picture, did you?

A. Oh, similar to it, not exactly.

Q. Well, I am asking exactly,—that is not a question of approaching it,—I want to know first whether you ever operated one like the one that is shown in that picture?

A. I do not know that it would be just exactly like that.

Q. You have operated engines?

A. Yes sir, several of them.

Q. And all engines are similar, aren't they?

A. Very similar, yes sir.

Q. And from the beginning, they have been similar.

A. Yes sir.

Q. From the first machine built, to now, they have been similar, haven't they?

A. Yes sir.

Q. There has only been a difference, in the degree of difference between the first engine, and the last one, and the ones you operated, and the one that is shown in that picture?

A. They are larger. Different parts are changed some to different places.

Q. How long has it been since you have operated an engine on the Burlington.

A. I think it will be 7 years next New Years day, if I am not mistaken.

Q. Since that time have you operated a locomotive engine?

A. No sir.

Q. On the Burlington, or any other road?

A. No sir.

Q. At any time prior to that time, did you ever operate a locomotive engine on the Union Pacific Road?

A. No sir.

405 Q. And what has been your business since the time you quit the service of the Burlington some seven years ago.

A. Oh, I have changed about, at one time or another.

Q. Well, what has been your business?

A. I am at present in the feed and fuel business, and I have been in the hotel and cafe business.

Q. You for a considerable time ran the cafe down on 11th street?

A. Yes sir.

Q. Next to the Little Gold Dust?

A. Yes sir.

Q. And you operated that restaurant how long?

A. Probably, a year and a half.

Q. You operated a hotel in Wahoo?

A. Yes sir.

Q. And you have been in the hotel and restaurant business, and in the feed business.

A. Yes sir.

Q. And you haven't had anything to do with operating railroads or locomotive engines in the last seven years?

A. No sir.

Q. Do you know from any information that you have had from actual experience, whether there has been any improvement in the matter of the air appliances used on engines in the past seven years?

A. I know there has been several changes made, that they call improvements, I do not know whether or not they are?

Q. You don't know whether or not they are.

A. I do not know whether or not they are, they call them improvements.

Q. You know there have been changes?

A. Yes sir.

Q. And they claim they are improvements?

A. Yes sir.

Q. But you do not know whether or not they are.

A. I could not say, no sir.

406 Q. And those changes which they claim are improvements, are in the air appliances for the brakes and for the bell, as well as other parts of the engine?

A. Yes sir, they are trying to improve all the time.

Q. And whether they have improved by those changes in the last 7 years, you are not able to state from any actual experience?

A. I could not say.

Q. You have an opinion, but not based upon any actual experience in the operation of engines in the last 7 years?

A. I haven't run an engine for the last 7 years.

Q. Now when you were on the road,—an engineer on the road for the Burlington, did they operate the bell ringer by the use of steam or air?

A. They used air.

Q. Did the Burlington use air on its engines for the operation of the Bell ringer?

A. On which engines.

Q. On any of its engines at that time?

A. Yes sir.

Q. What was the practice, did they have both kinds or occasionally use air. Was the bell ringer on the Burlington road 7 years ago, operated by the use of steam?

A. By air directly.

Q. And not by steam? Directly?

A. No sir.

Q. And not on any of the engines as far as you know?

A. Not that I know of.

Q. Now in this question that is propounded to you by Mr. Rose do you know where the pipes conducting the steam or the air from the braking appliances are located in that engine.

A. On this engine?

407 Q. From the question propounded to you by Mr. Rose, the hypothetical question, is there anything in that question, conveying to you any information as to the location of the pipes, conducting the air or steam either one, for use on the air brake?

A. There is nothing in the question.

Q. Would you want to know, and would you have to know something about the location of the air pipes, and the steam pipes in order to determine whether that appliance would be affected by the atmosphere or the condition of the weather?

A. No, I do not think it would be really necessary for me to know just where it is located.

Q. Would you have to know anything about their location?

A. I do not think I would have to know anything about it.

By Mr. Rose:

Q. That is, you know in a general way that they are always located outside and away from the steam?

A. Yes sir but they might be above the running board, and they might be below it.

Q. What I mean, and am trying to get at, is whether you have to take into account anything outside of that question and you do have to take into account the location of those pipe-?

A. Not very much as far as weather is concerned, they are outside.

Q. You take into account that they were outside?

A. Yes sir.

Q. If they were inside, it would make a difference?

A. If they were inside of the boiler it would make a difference, yes sir.

Q. If they were inside of the jacket of the boiler it would make a difference?

A. Yes sir.

408 Mr. Strode: What was that question of Mr. Rose's now?

Q. (Read as follows:) Assuming that the main reservoir

and the drive brake cylinders and the tank brake cylinder and the auxiliary cylinder of the New York Number five air brake pump was attached to Union Pacific Engine, number 213, a photograph of which I hand you, in the positions which you heard the witness Nicholson indicate, you may state whether, when the wind was high, and the temperature was 15 degrees below zero, the exposure of those reservoirs and air cylinders to the atmosphere could effect the free operation of the air brakes?

Mr. Strode: The defendant objects to the question as assuming facts not in evidence and not shown to be in evidence here, and not in evidence, and for that reason would be incompetent, and for the further reason that no proper and sufficient foundation is laid for this question, and the witness not shown to be competent to answer the question, and for the further reason that the evidence offered shows that the air appliance for the brakes and bell ringer, on these different engines, is different in character depending upon the style of the engine, and different in the matter of location of pipes and valves, and other details of the equipment, none of which details are given to the witness in the hypothetical question and for the further reason that the hypothetical question *and for the further reason that the hypothetical question* assumes that the witness should take into account the testimony of a witness without detailing or setting out in the hypothetical question, the facts which the witness is asked to take into account in answering the question.

Overruled. Exception.

A. Yes sir, it would make a difference.

Q. You may state whether you could at this time go out on the road and operate an engine of the type of 213, a photograph of which is exhibited to you?

409 Mr. Strode: The defendant objects to that question as calling for the conclusion of the witness and asking for him to support his own qualifications. Immaterial, irrelevant and incompetent, and no proper or sufficient foundation laid.

Overruled. Exception.

A. I should say yes sir.

Q. You may state whether in your experience you have ever known air brakes and appliances of such engines, of the New York Air Brake Company to fail, on account of cold?

Mr. Strode: The defendant objects to the question as incompetent, no proper and sufficient foundation laid, immaterial and not confined to the kind of equipment involved here, or to the time, and not shown that it refers to the particular kind of equipment involved here.

Overruled. Exception.

A. I have.

Q. Now you understand the principle of confining air in reservoirs?

A. I think I do.

Q. You may state how air is compressed in the reservoir so as to give power.

A. It goes from the air pump to the main reservoir.

Q. It is pumped in?

A. Yes sir, and it is pumped in with an air pump worked by steam.

Q. You may state whether the principle upon which that operates is within your own knowledge?

Mr. Strode: The defendant objects to the question as leading. (Question withdrawn.)

Q. You may state the principle upon which,—well state whether there is any variation in the principle that is applied in order to get power by compressing air?

Mr. Strode: The defendant objects to that question as leading and incompetent, and no proper foundation laid for the question, and his knowledge acquired in the operation of an engine seven years ago, and not in the operation of engines used at this time, and
410 upon the Union Pacific now.

Overruled. Exception.

A. No sir, I think not.

Q. Now from you- knowledge and experience in operating such devices you may explain the cause of the operation sometimes failing on account of cold weather?

Mr. Strode: The defendant objects to that question as immaterial irrelevant and incompetent, and no proper or sufficient foundation laid and record already shows that the witness is basing his testimony upon his experience, and knowledge acquired in the operation of engines in the service of the Burlington railroad some seven years ago.

Mr. Rose: I wish to add to that:

Q. Confining your explanation to such principles as in your opinion would be operative in all *cal*sses of air brake machinery?

Mr. Strode: The defendant objects to that question as incompetent, and no proper or sufficient foundation laid, and not shown that this witness has any knowledge of the kind or class or character of the equipment used on this engine at the time of the accident, or of the Huxoll injury, or the kind of character of equipment used on this engine at the time of the accident, or the kind or character of appliances used for braking equipment at the time and in what respect or to what extent the science of air braking equipment has improved since the witness was on the engine, some seven years ago.

Overruled. Exception.

A. Well, if there is moisture enough in the air, it causes it to freeze, and many times there is moisture in it.

411 Mr. Strode: The defendant moves to strike the answer of the witness as incompet*ant*, and no proper and sufficient foun-

dation laid for the answer, and incompetent, immaterial and irrelevant.

Overruled. Exception.

Q. You may state whether or not there is a tendency in the process of compressing the air in the reservoir to accumulate water in the reservoir itself?

Mr. Strode: The defendant objects to that question as incompetent, and no proper or sufficient foundation laid, not shown that this witness has any knowledge of the kind or class or character of the equipment used, on this engine at the time of the accident, or of the Huxoll injury, or the kind and character of appliances used for the brake equipment at that time, and in what respect or to what extent the science of air brake equipment has improved since the witness was on an egine, seven years ago.

Overruled. Exception.

A. Yes sir.

Q. Now from your experience in withdrawing air for application as power, after it is compressed in the reservoir, you may state what your observations have been as to whether the water accumulated in the reservoir affects the operation of the device?

Mr. Strode: The defendant objects to that question as incompetent, and no proper or sufficient foundation laid, not shown that this witness has any knowledge of the kind or class or character of equipment used on this engine at the time of the accident, or of the Huxoll injury, or the kind and character of appliances used for the brake equipment at that time and in what respect or to what extent the science of air brake equipment at that time, and in what respect or to what extent the science of air brake equipment has improved since the witness was on an engine some seven years ago.

Overruled. Exception.

A. It does effect the operation.

412 Q. How, in cold weather?

Mr. Strode: The defendant objects to that question as incompetent, and no proper or sufficient foundation laid, not shown that this witness has any knowledge of the kind or class or character of equipment used on this engine at the time of the accident, or of the Huxoll injury, or the kind and character of appliances used for the brake equipment at that time, and in what respect or to what extent the science of air brake equipment has improved since the witness was on an engine some seven years ago.

Overruled. Exception.

A. Well, it can do it from freezing, and your valves do not work as nice anyway when the air is wet as they do when it is dry.

Q. And when it is effected by freezing in the manner that you yourself have detailed what is it necessary to do in order to render the appliance efficient or to give it efficient operation again?

Mr. Strode: The defendant objects to that question as incompetent, and no proper foundation, or sufficient foundation laid, not

shown that this witness has any knowledge of the kind *or kind* or class or character of equipment used on this engine at the time of the accident, or of the Huxoll injury, or the kind and character of appliances used for brake equipment at that time, and in what respect or to what extent the science of air brake equipment has improved since the witness was on an engine some seven years ago.

Overruled. Exception.

A. Well, you have to find out where it is frozen, and where the trouble is, and thaw it out if you can.

Q. Now you may state from your own experience and knowledge of the use of such appliances what in common and ordinary practice is done to prevent,—if anything,—to prevent the accumulation of water and the freezing in excessive cold weather?

413 Mr. Strode: The defendant objects to that question as incompetent and no proper or sufficient foundation laid, not shown that this witness has any knowledge of the kind or class or character of equipment used on this engine at the time of the accident, or of the Huxoll injury, or the kind and character of the appliances used for the brake equipment at that time, and in what respect or to what extent the science of air brake equipment has improved since the witness was on an engine some seven years ago.

Overruld. Exception.

A. Why the reservoir should be kept well drained, and keep the water out and the moisture out. That is what freezes.

Q. In common and general practice how often is the air reservoir drained?

Mr. Strode: The defendant objects to that question as incompetent, and no proper or sufficient foundation laid, not shown that this witness has any knowledge of the kind or class or character of equipment used on this engine at the time of the accident, or of the Huxoll injury, or the kind and character of the appliances used for the brake equipment, at that time, and in what respect or to what extent the science of air brake equipment has improved since the witness was on an engine some seven years ago.

Overruled. Exception.

A. It should be done on the starting of every trip and I used to make a practice quite frequently of draining them some between divisions in order to keep them dry.

Q. From your experience as an engineer and assuming an engine of the type shown on the plate there, Number 213, of the
414 Union Pacific, with eight drive wheels equipped as detailed in your presence here by the witness Nicholson, and weighing two hundred and seven thousand pounds, that is running light, or without any load whatever, on a level track, and at a rate of speed of three to four miles an hour, how quickly or approximately or accurately could you stop such an engine so moving?

Mr. Strode: The defendant objects to that question as incompetent, and no proper or sufficient foundation laid and assuming facts not

shown in evidence in this case and asking the witness to consider the testimony of a witness in answering the question.

Mr. Rose: I think I will cut out the reference to the other witness, and limit it to the type of engine indicated on the plate, equipped with eight drive wheels and a New York Number five air brake appliance in good working condition. Under those circumstances how quick after receiving a signal to stop could the engineer possessing the skill and qualifications that are ordinarrily possessed by practical locomotive engineers, stop it.

Mr. Strode: The defendant objects to that question as incompetent, no proper and sufficient foundation laid, and assuming facts not shown in the evidence and because it is not assuming facts material to the inquiry, which evidence shows to exist, and not stating the facts shown in the evidence material to the inquiry, but only a portion of such facts.

Sustained. Exception.

Overruled as to all parts of the objection except that of foundation as to whether or not the engineer has ever stopped and engine in such a manner.

Q. In your business of running an engine, have you been accustomed to applying air and stopping the engine for emergency and otherwise?

415 A. Very often, yes sir.

Is that a part of the duties of the engineer?

A. Yes sir.

Mr. Strode: I am willing to specify as to the point that it leaves out certain facts that any witness would have to know that are material here. That is the condition of the track, and the condition of the weather at the time. The condition of the rails upon which the engine is being operated at the time, and I think there are other facts which I am not prepared at this moment to state.

The Court: Unless this is a preliminary to be followed up by a like state of facts, I think that is correct.

Q. Are you acquainted in a general way with the performance that an engine should show in reference to being stopped with an efficient equipment, if you have the general specifications of the engine and its weight, and character of air brakes, and the number of drive wheels and the like of that, going at a speed of from three to four miles an hour on a level track, on a cold day, and no obstructions in the way, where it had been snowing a little, some two or three inches of snow on the ground, and a heavy wind blowing so that there was none on the rails. What would you say,—whether with those things you could tell what performance an engine rightly equipped should show if operated by an engineer of practical skill such as possessed by the ordinary and practical engineer?

A. I think I could get a pretty close estimate.

Q. And you think you could be approximately accurate?

A. Yes sir.

Q. And do you base that conclusion upon your own experience in operating locomotive engines?

A. Yes sir.

416 Q. Now then, assuming in this case that the engine was of the style and equipment shown in the cut of Union Pacific engine 213, which I have exhibited to you, that it had 8 drive wheels, weighing 207,000 pounds, and was equipped with a New York Number 5, air brake device in efficient operating condition, and was traveling on a level road on a cold day, on a track free from snow,—that is the rails being free from snow,—how soon could that engine be stopped, under an emergency call, or signal, by an engineer possessing a degree of skill such as is unually possessed and exercised by practical locomotive engineers.

Mr. Strode: The defendant objects to that question as incompetent, and no proper and sufficient foundation laid, and assuming facts not shown in evidence in this case, and asking the witness to consider the testimony of a witness in answering the question.

Overruled. Exception.

A. Well, of course cases alter things, but as you have explained it to me in that particlar case if the brakes were perfect and the track was dry, and the weather was cold I would say that at most a person should not go over 8 or 10 feet, and very frequently we stop almost instantly, going at that rate of speed, with a heavy engine. With an engine of that built you can stop a little quicker than you can with an old standard engine,—a four wheel connection. This engine as near as I can get at it was what we used to call a consoldiated engine, Class A, a hog engine from the looks of it.

Cross-examination.

By Mr. Strode:

417 Q. You did not understand in answering that question that there was a cloud of steam and smoke lying over this track?

A. No sir.

Q. If there had been a cloud of steam lying over this track, would that in any way affect the dryness of the track or the rails?

A. Not unless it had been there long enough to moisten it.

Q. Well, what would be the general effect of steam and smoke coming from engines and striking the track, would it moisten the track, or make it any dryer?

A. Not unless the steam was wet. If you were working water through your cylinders.

Q. The testimony here shows,—not in this question,—but it shows that over this track about where this accident happened there was a lot of steam coming from engines, that were in the round house and on the spot track, and on account of the wind that steam was carried across the rail road track. Now what I am trying to

get at with you, is whether that steam would effect the dryness of the rail on the track?

A. It would if it was there long enough.

Q. It would tend to make the track hard and slippery, wouldn't it?

A. Yes sir, as I say, if the steam was wet, and had been there sometime, but just passing over,—

Q. But supposing it had been lying over that track all morning, —that happened at 11 o'clock, and that steam had been there all the forenoon,—the track would be slippery there and the rails in that condition?

A. It would if the steam had been there long enough to accumulate the dampness on the rail.

Q. But you didn't understand there was any steam on the rail but you understood it was a dry rail?

418 A. Yes sir.

Q. And that when the brake was applied that the wheels of the engine would grip the track?

A. You take it in the winter season, there is more or less frost in the rail.

Q. And then you get a slippery condition?

A. Not necessarily so.

Q. But yet you would have to know what the condition of the rail is, in order to know what distance it would take to stop an engine?

A. Well, I answered that question as it was given to me.

Q. I know you did. But you had to assume that the rail was dry, and everything was in good working order?

A. Yes sir.

Q. And the tracks in good conditon.

A. Yes sir, the tracks should be in good condition.

Q. And then you thought that you might stop within 8 or ten feet?

A. I do not think that I might, but I know I could, and that was putting it at the limit.

Q. Now if a man was struck by the engine, it might be 8 or 10 feet before the enginer would know it, mightn't it?

A. I do not know anything about it. Yes sir, he might not be looking, or he might be asleep.

Q. You do not know, or even attempt to tell this jury, about how soon this engine was stopped?

A. I do not undertake to tell them how soon that man could stop it.

Q. Nor, how soon it was stopped?

A. No sir.

Q. There is a difference between the time when you strike an obstruction and the time when the engineer may know that he struck the obstruction?

A. Yes sir, that can be possible.

Q. And until the engineer knows that an obstruction has been run into, he will not start to stop his engine?

419 A. He would not attmept to stop it unless he had reason for stopping, I do not suppose.

Q. And the 10 feet on the dry rail would begin to run from the time that the engineer knew that he had run onto something?

A. That would not be everything,—if he saw a person,——

Q. Well, you understand here that this man was not seen?

A. Well, I do not know anything about this case.

Q. Well he could not know anything about whdn to stop, or about running onto this man, until somebody told him, or somebody signaled him?

A. Well, it was after he had occasion to stop, that I was basing my testimony upon.

Q. And in that case, wouldn't the engineer have to be where he would be within reach of the air,—the automatic air brake, and of his reverse lever?

A. Well if he was running around there with steam blowing around him, he should be in immediate reach.

Q. Well, if he lost two seconds in getting hold of the appliance to turn the air on,—to turn on the air brake, he would go ten feet?

A. Those things all count.

Q. And it does not take very long to go ten feet?

A. Well, three miles an hour, a man can walk that.

Q. Well, a second is not very long either is it?

A. Not sometimes.

Q. And the time that the engineer reaches for his automatic air brake, the engine is moving while he is getting his appliance ready. Do you mean ten feet from the time that he turns on his air brake,—do you mean ten feet from that time, or some other time?

A. I think if I was going along on an engine, and on a rail here, and I saw a signal to stop, I mean from that time that I saw that signal, until I stopped the engine.

Q. Now, New York air brake number five, do you know
420 what kind of an air brake that is?

A. We had some New York air brakes.

Q. Well, was it a number five?

A. I do not know.

Q. Do they have different numbers in the New York air brake?

A. I could not say, I never used the New York air pump but very little.

Q. The fact that it is number five, would indicate they had different sizes and different kinds?

A. Yes sir.

Q. And the size of it would have something to do with the equipment?

Q. Well, I do not know whether or not the size of the pump, would have any material difference, if you get your pressure.

By Mr. Rose:

Q. About how big a quantity of water have you dra*n*in-d out of these air reservoirs at a single time?

Mr. Strode: The defendant objects to that question as immaterial, irrelevant and incompetent, and no proper or sufficient foundation laid, and conditions not shown under which this operation he is asking about was performed?

Overruled. Exception.

A. Oh, I never measured it, but then I have used tin buckets that we had on engines to catch the water, and I have seen a bucket full,—or two, turned out,—I could not say positively how much.

Q. Well, approximately in gallons?

Mr. Strode: The defendant objects to that question as immaterial, irrelevant and incompetent, and no proper or sufficient foundation laid and conditions not shown under which this
421 operation he is asking about was performed.

Overruled. Exception.

A. Well, how much will a common wo-den bucket hold.

Q. Have you seen a common ordinary wooden bucket full?

Mr. Strode: The defendant objects to that question as immaterial, irrelevant and incompetent, and no proper or sufficient foundation laid, and conditions not shown under which this operation he is asking about, was performed.

Overruled. Exception.

A. Yes sir.

Mr. Rose: That is all:

Mr. Strode: That is all:

Witness excused.

O. D. Herrick, called as a witness on behalf of the plaintiff, testified as follows upon examination.

By Mr. Rose:

Q. Mr. Herrick you were formerly and official down in the mechanical department of the Burlington yards here sometime?

A. I was an employee of the supply department for years.

Q. Was you ever in any position in which you came in contact with engines and their equipment?

A. Nothing, only issuing of the material, to the machinists?

Q. Have you had any observations as to the operation, and as to the effect of cold weather on the operation of air appliances on steam locomotives?

A. Nothing only hearsay.

Q. You have no practical knowledge from being connected then with the operation of engines?

A. None whatever.

422 Q. All your knowledge was hearsay knowledge?

A. That is all.

Cross examination.

By Mr. Strode:

Q. You do have some knowledge of the effect of cold weather?

A. A good deal through hearsay, Yes sir.

Witness excused.

Mr. Hoagland: Now the plaintiff offers in evidence from the deposition of Fletcher, the answer to question 159, the answer to question 160; the answer to question 161; the answer to question 164; the answer to question 165; and the answer to questions 171 and 172.

Mr. Strode: The defendant objects to the offer of the answers to the above named questions, as immaterial, irrelevant and incompetent, and no proper and sufficient foundation laid.

Sustained. Exception.

Mr. Hoagland: The plaintiff now offers in evidence from page 2394 of Cobbey's Annotated Statutes of Nebraska, so much of the tables of exceptancy of life as covers the years 28 and 29.

No objection.

For 29 years of age, expectancy of life as follows:

Actuaries, 35.15; American 36.03; Carlyle 35; North Hampton, 28.79.

For 28 years of age, expectancy of life as follows: Actuaries 35.86; American 36.73; Carlyle 35.09; North Hampton 29.30.

423 Mr. Comstock: The plaintiff now offers in evidence, under the title definitions, immediately following the paragraph and catch words, "Yard Engine" on page 9 of Exhibit 3,—it is under the general heading definitions.

(Reads as follows:) "An engine assigned to yard service, and working within yard limits."

Mr. Comstock: Also on page 9, under the general title "definitions," the plaintiff offers in evidence, immediately following the catch words of the paragraph, "Under Control."

Mr. Strode: The defendant objects to the offer as immaterial irrelevant and incompetent, no proper or sufficient foundation laid, immaterial, and admitting however the book of rules that counsel is reading from to be a book of rules of the Union Pacific Railroad Company, at the time of the accident. But basing the objection principally upon the point that the rule sought to be introduced by counsel has no application and is not shown to have any application to the yard or yard engines.

Overruled. Exception.

That portion of the book of rules offered by Mr. Comstock, received in evidence, and read to the court and jury, as follows:

"Under Control:" To be able to stop within the distance track is seen to be clear."

Mr. Comstock: The plaintiff offers in evidence Rule Number 9, on Page 12, of Exhibit 3.

Mr. Strode: The defendant objects to that offer as incompetent, irrelevant and immaterial.

Overruled. Exception.

Rule referred to and offered by Mr. Comstock received in evidence and read to the Court and Jury as follows: "Night signals must be displayes from sun-set to sunrise. When weather or other
424 conditions obscure day signals, night signals must be used in addition."

Mr. Comstock: The plaintiff offers in evidence Rule Number 18, on page 19, of Exhibit 3.

Mr. Strode: The defendant objects to that offer as incompetent, immaterial under the issues in this case and in no way referring to any situation existing at the time of this accident, but referring to the operation of yard engines in the night time, and not within the issues of this case.

Overruled. Exception.

(That part of the rules offered by Mr. Comstock, received in evidence, and read to the court and jury as follows:)

"Yard engines will display the headlight to the front and rear by night. When not provided with a headlight at the rear, two white lights must be displayed. Yard engines will not display markers."

Mr. Comstock: The plaintiff offers in evidence Rule 24 of Exhibit 3.

Mr. Stroude: The defendant objects to the offer as incompetent, immaterial and irrelevant and principally for the reason that the rule does not refer to conditions that existed at the time of this accident, and the rule does not refer to work in the yards by a switch engine, as is specifically noted by the terms of the rule itself.

Sustaines. Exception.

(Although not read to the court or jury, a copy of the rule offered is as follows:)

"When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Mr. Comstock: The plaintiff offers in evidence rule number 30, found in exhibit 3.

Mr. Strode: The defendant objects to that offer as in-
425 competent, immaterial and not within the issues here, and applying to a situation where the engine is stopped, and about to be started, and for the reason that at the time and place of this accident the engine was not approaching a station, or a public road crossing, tunnels, or snow sheds.

Overruled. Exception.

(That part of the rules offered by Mr. Comstock, read to the court and jury as follows:)

"The engine bell must be rung on approaching every station, public road crossing, at grade, tunnels and snow sheds, and until they are passed; and the whistle must be sounded at all whistling posts.

Mr. Comstock: The plaintiff offers in evidence Rule 91*a* of Exhibit 3.

Mr. Strode: The defendant objects to that offer as immaterial

irrelevant and incompetent, and not within any issues in this case, and referring to the operation of a train when no train was involved in the operation at the time of the accident in this case.

It applies only to a train and to a train only when such train is approaching a station and has no application then to a switch engine when in the yards. And comes within the exception noted in the rule itself.

Overruled. Exception.

(That part of the rules offered by Mr. Comstock, read to the court and jury as follows:)

"Trains must approach all stations where the view is obscured (not included in block signal limits—see Rule 302) at a rate of speed that will enable them to stop *w*hould an emergency arise.

Responsibility for collision rests with the following train, but this does not relieve the leading train from protecting itself."

426 Mr. Comstock: The plaintiff offers in evidence Rule 93 found in Exhibit 3.

Mr. Strode: The defendant objects to that offer as immaterial irrelevant and incompetent, and having no application whatever to any issue or fact involved in this case.

Overruled. Exception.

(That portion of the rules offered by Mr. Comstock read to the court and jury as follows:)

"Within yard limits the main track may be used, protecting against first class trains. Second class and extra trains must move within yard limits prepared to stop, unless the main track is seen or known to be clear."

Mr. Strode: The defendant further objects to the above offer of rule 93, for the reason that the switch engine involved here was neither a first or second class train, and is not within the meaning of this rule, in any particular.

Overruled. Exception.

Mr. Comstock: The plaintiff offers in evidence Rule 105 of Exhibit 3.

Mr. Strode: The defendant objects to that offer for the reason that by its terms it is shown to apply only to the operation of trains, and to conductors and engine men in the operation of trains, and not to the operation of switch engines, in switch yards.

Overruled. Exception.

(That part of the rules offered by Mr. Comstock, read to the court and jury as follows:) "Both conductors and enginemen are responsible for the safety of their trains and, under conditions not provided for by the rules, must take every precaution for their protection."

Mr. Strode: The defendant further objects to the last offer

427 for the reason that by the terms of the rule itself it applies to the safety of the train itself and has no other application.

Overruled. Exception.

Mr. Comstock: The plaintiff offers in evidence Rule 106, or Exhibit 3.

Mr. Strode: The defendant objects to that offer as having no application to the operation of a switch engine in the switch yards,

and only applying to the operation of trains, and as immaterial, irrelevant and incompetent.

Overruled. Exception.

(That portion of the rules offered by Mr. Comstock read to the court and jury as follows:)

"In all cases of doubt or uncertainty, the safe course must be taken and no risks run."

Mr. Comstock: The plaintiff offers in evidence Rule 882 of Exhibit 3.

Received in evidence without objection and read to the court and jury as follows:

"While switching, the engineman and fireman must remain on the engine. Exercise great care in handling engine while yardmen or others are making couplings and give close attention to signals."

Mr. Comstock: The plaintiff offers in evidence Rule Number 893.

Mr. Strode: The defendant objects to the offer of Rule 893 as immaterial irrelevant and incompetent and having no application to the operation of a switch engine in the switch yards, or to the conditions existing at the time of the accident which is involved in this suit, the rule having particular application to the operation of trains, and to the matter of trains which have lost time, prohibiting them from seeking to make up lost time during certain conditions of the weather.

428 Overruled. Exception.

(Rule 893 as offered by Mr. Comstock read to the court and jury as follows:)

"During foggy or stormy weather do not attempt to recover lost time; take extraordinary precautions, both at switches and at places where authority to proceed depends upon signals."

Mr. Comstock: The plaintiff offers in evidence Rule number 98 of Exhibit 3.

Mr. Strode: The defendant objects to that offer as immaterial irrelevant and incompetent, and not within the issues, and having no application to the operation of a switch engine in a switch yard, but referring only to trains being operated over the lines of the company. And for the reason that at the point and under the conditions at which this accident happened, there was no railroad crossing at grade, or draw-bridges involved, or junction point, or train.

Overruled. Exception.

(Rule 98 as offered by Mr. Comstock, read to the court and jury as follows:) "Trains must approach the end of double track, junctions, railroad crossing at grade and drawbridges prepared to stop, unless the switches and signals are right, and the track is clear. Where required by law, trains must stop."

Plaintiff rests.

It now being 5 o'clock P. M. October 17th, 1913, court adjourned to meet at 9:30 A. M. Monday morning, October 20th, 1913.

429 9:30 A. M. Monday October 20th, 1913. Court met pursuant to adjournment, and the following proceedings were had and done.

Mr. Strode: The defendant, now moves the court to direct a verdict against the plaintiff and in favor of the defendant, for the reason that the evidence offered by the plaintiff is not sufficient to sustain a verdict in favor of the plaintiff, and is insufficient to sustan the alleged cause of action set out in the plaintiff's petition.

Overruled. Exception.

Mr. Comstock: If your honor please, the plaintiff would like to withdraw her rest in order to offer a rule or two further.

No objection.

Rest of plaintiff taken last Friday evening at the adjournment, withdrawn temporarily.

Mr. Comstock: The plaintiff offers in evidence the paragraph preceded by the catch word "Train", under the general head of Definitions, on page 7, of Exhibit Number Three.

Received in evidence without objection and read to the court and jury as follows: "An engine, or more than one engine coupled, with or without cars, displaying markers."

Mr. Comstock: The plaintiff offers in evidence on the same page the definition of "Train of Superior Right" which is found on page 7 of Exhibit 3.

Received in evidence without objection and read to the court and jury as follows:

"A train given precedence by train order".

Mr. Comstock. The plaintiff also offers the definition of train of superior direction, found on page 7, of Exhibit 3.

Received in evidence without objection, and read to the court and jury as follows:

430 "A train given precidence in the direction specified in the timetable as between trains of the same class. Note—Superiority by direction is limited to single track.

Mr. Comstock: The plaintiff also offers in evidence the definition of "Main Track" on Page 8 of Exhibit Number Three.

Received in evidence without objection, and read to the court and jury as follows: "A track extending through yards and between stations upon which trains are operated by time-table or train order, or the use of which is controlled by block signals.

Mr. Comstock: The plaintiff also offers in evidence Rule 14 of Exhibit 3.

Mr. Strode: The defendant objects to that offer as immaterial, irrelevant and incompetent, and has no application whatever to the yard engine or switching in yards, as shown by the terms of the rule itself, and as tending to confuse the jury as to the rules and regulations that might be involved in this action.

Overruled. Exception.

Received in evidence and read to the court and jury, and a copy of the same is found in Exhibit 3, which is hereto attached and made a part hereof.

Mr. Comstock: The plaintiff offers in evidence Rule 29 of Exhibit 3 found on page 21.

Mr. Strode: The defendant objects to that offer as incompetent and immaterial, and nothing whatever to do with this case, any more than the one just read.

Sustained. Exception.

(Rule offered, to which objection was sustained, will be found in Exhibit 3, which is hereto attached and made a part hereof.)

Mr. Comstock. The plaintiff offers in evidence Rule 71, on page 22 of Exhibit 3.

431 Mr. Strode: The defendant objects to that offer as immaterial, and in no way applicable to any issue of fact, or any issue of pleading here. I do not see what is the object of introducing these rules that have no application to the condition here.

Overruled. Exception.

(Rule 71, as offered by the plaintiff read to the court and jury, and read as follows:)

"A train is superior to another train by right, class or direction. Right is conferred by train order; class and direction by time table. Right is superior to class or direction. Direction is superior as between trains of the same class."

Mr. Comstock: The plaintiff offers in evidence the definition of "Home Signal" on page 78 of Exhibit Number Three.

Mr. Strode: The defendant objects to that offer as immaterial irrelevant and incompetent, and not within any issue in this case, and has no application to any condition or situation involved here, and as tending to confuse the jury in respect to such rules and regulations as would be involved in this action. There is no evidence of any fixed signals or any fixed signals being involved at any point in this controversy.

Overruled. Exception.

(Rule as offered by Mr. Comstock, read to the court and jury as follows:)

"A fixed signal at the point at which trains are required to stop when the route is not clear."

Mr. Comstock: The plaintiff offers in evidence Rule 304 on page 90 of Exhibit 3.

Mr. Strode: The defendant objects to that offer as immaterial, irrelevant and incompetent, and not within any issue in this

432 case, and has no application to any condition or situation involved here, and as tending to confuse the jury in respect to such rules and regulations as would be involved in this action. There is no evidence of any fixed signals being involved at any point in this controversy.

Overruled. Exception.

(Rule 304 as offered by Mr. Comstock read to the court and jury as follows:)

"In foggy or stormy weather enginemen must approach both Distant and Home signals with great care, and have their trains under control."

Plaintiff rests.

Mr. Strode. There is probably a few further questions we would want to ask Mr. Finch on cross examination, and if that is agreeable to counsel, we want to reserve the right at this time to ask some further questions on cross examination.

Mr. Rose: That is all right.

Mr. Strode: We want to renew the motion made at the close of the testimony when plaintiff rested the first time. Which was as follows: "The defendant now moves the court to direct a verdict against the plaintiff and in favor of the defendant, for the reason that the evidence offered by the plaintiff is not sufficient to sustain a verdict in favor of the plaintiff, and is insufficient to sustain the alleged cause of action set out in the plaintiff's petition.

Overruled. Exception.

433 *Defense.*

CLOYD M. JOHNSTON, called as a witness on behalf of the defendant, was first duly sworn and testified as follows upon examination,

By Mr. Strode:

Q. What is your name?

A. Cloyd M. Johnston.

Q. You were called as a witness in this case a few days ago?

A. Yes sir.

Q. Were you in 1911, at the beginning of the year, employed by the Union Pacific Railroad Company?

A. Yes sir.

Q. How long have you worked for the Union Pacific Railroad Company?

A. Since March 1898?

Q. Where have you been working for the Union Pacific, since the year 1898?

A. At Kimball, North Platte, Hershey and Sidney.

Q. How long have you worked at Sidney for the Union Pacific railroad?

A. I moved to Sidney in May 1909.

Q. So you had lived there 2 years before the accident?

A. Yes sir.

Q. Over two years,—about two years and a half?

A. Yes sir.

Q. In what capacity or in what branch of the service are you employed by the Union Pacific at this time?

A. Road master.

Q. Stationed where·

A. Kearney.

434 Q. You live now at Kearney?

A. Yes sir.

Q. And you are a man of a family?

A. Yes sir.

Q. Over what branch,—what portion or division of the Union Pacific, are you road master?

A. The Kearney branch and the Hastings cut off.

Q. When did you take on the duties of road master, at that station for the Union Pacific.

A. July 1, of this year.

Q. Then were you employed at Sidney up until July of this year, Mr. Johnston?

A. Yes sir, practically. I was promoted to the position of general foreman, October last, while I lived there, and I was at different places on the road, and my family was located at Sidney, up to July 1st.

Q. And what was your employment to January 1st, 1911?

A. As section foreman in charge of the Sidney yards.

Q. Prior to January 1, and how long subsequent were you the man in charge of the,—that is the section foreman in charge of the yards at Sidney?

A. I didn't quite get that question.

Q. How long before January 1st, and how long after January 1st, 1911, were you section foreman of the Sidney yards?

A. I took charge as section foreman of the Sidney yards in May 1909, and I was section foreman in charge of that yard up to that time, and after that time until October 12th.

Q. Then from 1909 to 1912,—

A. May 1909 to October 1912.

435 Q. What were your duties as section foreman of the yards at Sidney,—what did you have to do,—what was your work?

A. To repair the track and to see that everything was in good condition.

Q. Did you have any duties beyond the track and road bed in the yards,—did you have anything to do with the cars or engines, or the equipment?

A. No sir.

Q. Your duties were confined to the road bed and the track?

A. Yes sir.

Q. And the appurt-ances connected with those?

A. Yes sir.

Q. What would be incident to the track and road?

A. Yes sir.

Q. Did you have a gang of men working under you during all this time.

A. Yes sir.

Q. What condition of the road,—what condition were the tracks kept in by you ?

A. They were kept in first class condition.

Q. What is the condition of the road bed, how is it kept up,—what is it built up with?

A. Sherman gravel.

Q. Do they call it Sherman or Sherman Hill?

A. Sherman Hill Ballast on the mainline,—and number one track was in Sherman Hill ballast, and the other tracks was cinder ballast.

Q. Now you recall the morning do you, that Mr. Huxoll was injured?

A. Yes sir.

Q. What were doing that morning?

436 A. I was taking care of my yards, such as cleaning the switches,—and taking care of any emergency that would show up, that was connected with my track.

Q. When did you go on duty in the yards that morning?

A. I went on duty,—the storm started on Saturday night, at about 10 or probably ten thirty, and I sent on duty between 12 and 1 o'clock that night.

Q. That was on account of the storm?

A. Yes sir.

Q. And you continued on duty up to when?

A. I was on duty until possibly 5:30 or 6 o'clock that night.

Q. And what were you doing?

A. Cleaning switches and platforms and looking after the general conditions of the tracks through the whole yards.

Q. In your work there in charge of the yards, are you employed all the time in the yards?

A. Yes sir.

Q. Have you observed and noticed the switching crews at work in the yards, during the time that you have been in charge of the yards there, as section foreman?

A. Yes sir, I have.

Q. Have they worked right along during the time you have worked, Mr. Johnston?

A. Yes sir.

Q. Working in the yards?

A. Yes sir.

Q. Making up the trains?

A. Yes sir.

Q. Picking up cars and putting them where they belong?

A. Yes sir.

437 Q. Have you observed that work from day to day?

A. Yes sir.

Q. Since 1909?

A. Yes sir.

Q. Up to the time you quit that position?

A. Yes sir.

Q. Did you observe the switching crew at work in the morning of January 1st, 1911, the day upon which Mr. Huxoll was injured?

A. Yes sir.

Q. Do you know now where you saw that switching crew and the engine at work during any part of that morning?

A. Yes sir.

Q. You may state to the jury where in the yards you saw that engine crew at work?

A. Well, they passed me a number of times,—I was of course at different places around the depot there, where there are many switches and around the round house, we were working there, tending to the switches, and they passed me there. And around by the freight house tracks, and they passed me also at the east and west end of the yards.

Q. Did you notice at any time in the morning when this engine was working there in the yards, whether the bell was working on that engine?

A. Yes sir, the bell was working.

Q. How do you know it was working?

A. Well the reason I know it was working the sound of the bell attracted my attention by having a different sound than it ordinarily would, on account of, I presume, the snow on the bell, it made a different sound.

Q. Well, you know it was working, because you heard it
438 ring?

A. Yes sir.

Q. In switching there in the yards during all the time that you have been there as section foreman, did you ever see any switchman riding on the front end of the engine flagging the train through the yards or through any steam or smoke that was there in the yards?

A. No, I didn't.

Q. Where have you observed the switchmen in connection with his work in the yards, in relation to the engine,—where does he work usually?

A. He generally works from a point where it would be the handiest to his work as a rule.

Q. There are two switchmen with the engine crew,—isn't there or is there one?

A. Well, it all depends upon their work—sometimes there is one right with them,—

Q. Well, I didn't mean that. I meant are there two switch*ing* with the switching crew?

A. Yes sir, there are two switchmen with the switching crew.

Q. And what do these switchmen do in helping with the work in the yards?

A. Why, make up their trains,—that is,—I do not understand what you are,—

Q. Well, in going down through the yards to take up or pick up cars, and put them in different places and make up trains, now, what do the switchmen do in connection with that work?

A. Oh, give signals and see that the cars are coupled and throw the switches and so forth.

Q. The engine men just run down and pick up a car, they have to couple the cars?

A. Not as a rule,—the knuckles have to be open.

439 Q. And the switches have to be set by somebody?

A. Yes sir.

Q. Now do one of these switchmen look after the coupling of the cars particularly, and the other one to the switches or how do they divide their work?

A. As a rule one man looks after the switching, and another one looks after the coupling.

Q. Now the man that looks after the switches, he is the man who stays on or about the engine, most of the time?

A. Yes sir.

Q. But is he on the engine?

A. He can't be on the engine and look after the switches.

Q. No, he gets off the engine to set the switch and on the engine and goes on,—and while he is setting the switch there is no one on the engine as far as the switchman or switchmen are concerned?

A. No sir.

Q. While he is setting the switch or closing it, do the engines move?

A. No sir.

Q. They wait for him?

A. Yes sir.

Q. They do not cause him to run to catch up, but they come to the point and let him off and pass by the switch and he closes the switch and they wait for him to get back on, is that right?

A. Yes sir.

Q. Now were you past this point any time during that morning, where this accident happened?

A. Yes sir.

Q. More than once?

A. Yes sir, I was past there a couple of times,—I had to go passed there,—as I lived east of there on the south side of the track,
440 I had to pass through this steam and smoke.

Q. Where did you live?

A. I lived east of the coal chutes on the south side of the yards in the company house.

Q. Was that right in the yards?

A. Yes sir.

Q. And coming west, you came by this point?

A. I had to go through there in order to get to my work.

Q. Did you afterwards, during the course of the morning, and in your work, go around or near this point?

A. I went right through at the point about where Mr. Huxoll was killed, between the spot track and the main line somewhere around the neighborhood of ten o'clock.

Q. What were you doing at that time,—and what caused you to pass along there?

A. I was inspecting my track and going from one switch to the other, and also seeing that the water crane and every thing was in good condition.

Q. Did you go to this particular water crane that has been mentioned here?

A. Yes sir.

Q. What did you observe about the condition of the water crane and around the water crane?

A. There was some snow that was drifted against the rails but there was no ice around the water crane. Possibly on the platform there was a very little scum *if* ice, not to amount to anything.

Q. Did you pass over the platform?

A. Yes sir.

441 Q. Was there any obstruction to your passing there on account of this ice?

A. No sir.

Q. You say that that was in the neighborhood of ten o'clock, Mr. Johnson?

A. Yes sir, somewhere about that time. I could not say the exact time.

Q. Could you see the rails on the track so that you could see where you were going?

A. The fog was pretty thick but I could tell where I was going, —I could tell which track I was on, or whether I was between the tracks.

Q. Or just where you were?

A. Yes sir.

Q. You could see that the rails weren't buried in the snow?

A. No, I could see the rails, I could see the dark trail of the rails through the snow.

Q. Were you at this water crane or in the neighborhood of that water crane about the time of the accident, also?

A. Well, it was after the accident, I went down there at the point where it occurred, and I was around the water crane then.

Q. When were you down there with reference to the time Mr. Huxoll was taken out from under the engine?

A. Well, I should judge it was between 11:30 and 12 o'clock they had taken Mr. Huxoll out from under the engine, and had him to the depot when I went down.

Q. Had the engine been moved away from there?

A. 213?

Q. Yes sir.

A. Yes sir, It had been taken away from there.

442 Q. Could you see where they had been working there, and getting Mr. Huxoll out?

A. Yes sir.

Q. And did you go over the track all along at that time?

A. Yes sir.

Q. And all over the conditions there in the yard in that neighborhood?

A. Yes sir.

Q. Were you required to do that in the discharge of your duty?

A. I was, so I could make out my report as to the accident, and the cause of it, as well, such as the company requires all foreman to make out.

Q. That is where the accident happens in the yard?

A. Yes sir, or any place along the line.

Q. Yes sir, but as far as your duties were concerned, any accident that would happen in the yards?

A. In my jurisdiction, I was supposed to report anything that happened in my jurisdiction.

Q. And did you or do you have anything to do with reporting about the engines and locomotives or just simply the track, Mr. Johnston?

A. Simply the track,—if there had been any defects in the track, it would have been necessary for me to make a report,—it was necessary to make a report as to whether the tracks were O. K.

Q. And were you required to report as to whether or not there was any defective condition about the water crane?

A. Yes sir.

Q. That would be then, a requirement of your duty?

A. Yes sir.

Q. Now did you at that time make any examination of the condition there about the tracks and about the water crane for the purpose of ascertaining the exact condition there and for the purpose of making your report about it?

443 A. Yes sir.

Q. What did you find if anything?

A. I didn't find anything out of the ordinary,—if there was a storm of that kind the tracks *was* in good condition except the snow was drifted around the rail,—which as you know, *show* will drift around anything that will raise above the level of the ground, and of course the rails *was* level with the snow.

Q. What condition did you find about the water crane, if anything?

A. The water crane was in go-d condition,—there was very little ice on the platform, but not to amount to anything.

Q. How much of a platform was there around that water crane, Mr. Johnson?

A. 13 feet, six inches long and seven feet wide.

Q. How high is it from the ground?

A. On the level with the ground,—with the main line rails, which is six inches high.

Q. Is that six inches high,—the jury box,—at the front end?

A. Yes sir, just about six inche*d* high,—six or seven.

Q. That is, the top of the platform would be level with the top of the rail?

A. Yes sir.

Q. It would be just about as high and not quite as high,—the dimensions would not be quite as high as that?

A. Just about the same.

Q. That was 13 feet and six inches long?

A. Yes sir.

Q. And how wide?

A. Seven feet.

Q. What kind of a platform was it?

A. Two inch plank,—two by ten or twelve,—I do not remember just which.

444 Q. A good solid platorm?

A. Yes sir.

Q. Could you see there in the snow, or had the snow filled in, and drifted in, from the wind, where Mr. Huxoll was taken out?

A. Yes sir, I could see where Mr. Huxoll was taken out, and made an examination of the track, and also cleaned the snow out of the track and looking for the watch. It was reported that his watch was

lost, and I got my men down there and stood over them to see that they didn't get the watch and keep it. And his watch was afterwards discovered in his room.

Q. And you looked up and down the track, and all over there, and shoveled the snow away, to find his watch?

A. Yes sir.

Q. How far away was it, do you know, or about how far, from the platform of the water crane, to where Mr. Huxoll was taken out from under the engine?

A. He was taken out from under the engine just the second joint from the water crane. There is a joint right at the water crane and he was taken out the second joint west. It would be sixty-six feet, the rails are thirty-three feet long.

Q. Which rail is it that has a joint opposite the water crane? The north or south rail?

A. The north rail.

Q. So that is the way you fix it in your mind?

A. Yes sir.

Q. Was that at a point where you can see he was taken out from under the engine?

A. Yes sir.

Q. Could you at that time tell how far Mr. Huxoll had been dragged under the engine?

445 A. No, I could not, for the reason there had been too many tracks around there. By the time I got down there, I could not tell where Mr. Huxoll was hit.

Cross-examination.

By Mr. Rose:

Q. You say this storm commenced between ten and eleven o'clock the night before?

A. I think it was just right around 10 o'clock, and I was called somewhere around mid-night to get out, somewhere along there.

Q. That there came such a menacing blizzard that you felt the duties of your employment required you to get up at mid-night and stay there while the storm was raging?

A. Yes sir.

Q. And you did that?

A. Yes sir.

Q. What was the temperature the next morning?

A. Well I could not say exactly, it was somewhere around 15 degrees below zero, as near as I know, it was very cold anyway.

Q. How many engines would you extimate had been filled with water from this crane during the forenoon, and before Huxoll was hurt?

A. Well, I could not say as to that, they have different points in the yard to water their engines.

Q. Were there several at this crane?

A. Well, I presume there was.

Q. Now you describe the opening and closing of the valve in that crane, to let the water out, and to stop it?

A. Describe the valve?

Q. Yes sir, show how the water crane opened and closed?

A. The stand pipe is pulled around, and placed over the man hole in the tank; and the spout is pulled down off of the
446 goose-neck and placed in the man hole of the tank, and the man who is taking the water reaches over and pulls the lever on top of the goose-neck down and opens the valve and lets the water flow.

Q. Does the valve open with the pulling down of the gooseneck?

A. No sir.

Q. And then when the tank is full it is turned around again?

A. It is put back into its normal position after the engine is watered.

Q. Is there any drip—is the engine filled there with some drip of water?

A. There would be some drip,—there is bound to. Very little though as a stand pipe.

Q. Well there might be a gallon or about two gallons for every engine?

A. I never measured it.

Q. Well, you would have an idea that if a man was standing there, he might get doused with a bucket full of water?

A. It all depends on the man who is watering the engine.

Q. Yes sir, and then in all cases some leakage is involved in the working of those valves?

A. Yes sir, there must be some.

Q. And of course then water leaked that morning and froze didn't it, in a very short time?

A. Yes sir.

Q. It didn't run away?

A. No sir.

Q. Not in weather that is 15 degrees below zero?

A. No sir.

Q. And it froze just wherever it happened to fall?

A. Yes sir.

447 Q. And there would be some dripping while the stand pipe was being turned around, wouldn't there,—while the crane was being turned around?

A. There was very little.

Q. I didn't ask you how much, I asked you if there would be some?

A. Yes sir.

Q. And there would be some water drip in the whole course of the arc in which the crane moved, unavoidably?

A. Yes sir, there would some.

Q. And the quantity of ice that would be shown there by 11 o'clock, would be dependent upon how many engines had been watered, and the care that had been used in that kind of weather by the man who operated the crane?

A. Yes sir.

Q. Have you observed workman under you well enough to know whether they can exercise the same degree of care out in the weather when the thermometer is fifteen degrees below zero, as in better conditions?

A. There is more care taken in watering engines such as that, in zero weather.

Q. Well, can you tell whether a man can do his work with the same degree of exactness in those conditions as he can in normal conditions?

A. Well, I do not know why he could not.

Q. Well, you give that as your deliberate judgment that a man can work as efficiently in weather where the temperature is 15 degrees below zero, as he can where the weather was normal?

A. I do not quite understand.

448 Q. Isn't all labor less efficient in weather conditions of that kind, in a storm like that, with the temperature as low as that, than in normal conditions,—it disables a man from doing his work in a measure, doesn't it?

A. He feels the weather,—and probably he is more neglectful at that time.

Q. Well, is there any way to avoid a certain degree of disability to the ordinary workman, in that kind of weather, Mr. Johnson?

Mr. Strode: The defendant objects to that question, unless it is confined to the particular work which is involved here.

(Question withdrawn.)

Q. Now you never saw a switchman flag through that darkness did you?

A. I never did.

Q. Ever though there was no headlight ahead on the leading end, and there was total darkness, you never saw in any condition in your life, a man flag an engine or a car through?

Mr. Strode: The defendant objects to that question as improper cross examination, and not in any way relating to any issue here.

Overruled. Exception.

A. Not in the yards, unless he was on the main track, and on some passenger train's time, and then I have. Flagging against first class trains.

Q. Do you know what switchman flagged engineer Fletcher through that day, or whether any did?

Mr. Strode: I think this cross examination should be held to cross examination, and I object to that question, for the reason it is not proper cross examination.

Overruled. Exception.

A. No sir.

449 Q. You do not pretend to say that no switchman did flag an engine through that locality where the track was obscured on that very day do you?

Mr. Strode: The examination of this witness was confined to the work in the yard, of a yard engine. Now Mr. Rose wants to examine him about the operation of trains. Now if it is all,—if it is just to be dumped in here,—the operation of trains along with the operation of yard engines, when the yard engine is the thing that is involved, and Mr. Huxoll is the man who is involved, if we are then to put alongside of that the operation of trains, it just,——

Overruled. Exception.

A. I didn't see any of them flagged through.

Q. Therefore do you say that upon this very day, and under like conditions, that light engines weren't flagged through this very spot in the yards, the very locality in the yards where the track was obscured?

A. I didn't see any engines flagged through.

Q. Well, you do not pretend to say that any light engines weren't flagged through on that day?

A. I seen Zimmer go through with not flagging on that day.

Q. Did you see the light engine in charge of Conductor Fletcher go through there that day?

A. No sir.

Q. That identical spot?

A. No sir.

Q. Would you say that when he went through he didn't absolutely require the flagman to go on ahead and direct him by signal from the ground?

Mr. Strode: The defendant objects to that question as immaterial irrelevant and incompetent, and improper cross examination, and misconduct on the part of counsel who is already advised by
450 this witness that he didn't see Fletcher go through there, and the purpose of the question being to convey to the jury that Fletcher did go through there, and was flagged through.

Overruled. Exception.

A. Who do you mean, Fletcher?

A. Yes sir.

A. I didn't see Mr. Fletcher that day, with his train at all,—I didn't see him go through. For all I know of, he might have gone through there with an engine, but I didn't know it was his engine.

Q. Did you see every trip and engine made through that smoke and steam that day?

A. No sir, I didn't.

Q. Was that a common or usual condition of the weather, and of the obscuring of the track,—was that a common condition existing in that yard?——

A. No,—do you mean does it ever exist before, or after.

Q. No, I ask if it was a common or unusual condition?

A. Unusual condition.

Q. Would you say that the methods of operation in those unusual conditions were the same as they were in normal conditions of weather?

A. Do you mean that they passed in through this place and back and forth?

Q. Would you say that the methods of operation in those unusual conditions were the same as they were in normal conditions of weather?

A. No, they weren't. Engines and trains were going through there, and always slowed down.

Q. You know that the rules require extra precautions to be taken in extraordinary conditions like that in question in the train service, or in the track service also?

A. They do in the train service.

451 Q. Well you are familiar enough with the train service to know that extra precautions are required by the rules under the train service?

A. I would consider that extra precaution.

Q. Well just answer my question. The general term, "Extra precaution might mean regarding many conditions, too, might it not?

A. Yes sir.

Q. Now ordinarily you would not get up and go out in that yard at midnight with a gang of men?

A. No, unless it was necessary.

Q. I said ordinarily?

A. No sir.

Q. Now you said you cleaned the switches and swept the platforms,—what for?

A. So they could be used.

Q. What was on them?

A. Snow.

Q. Did you find any drifts about the yards, any place?

A. Yes sir.

Q. It was a light snow falling in cold weather and in a high wind, and it drifted badly, didn't it?

A. Wherefer there was anything to hold it, it would hold snow.

Q. You say when you went through the drifting steam and smoke that you could see when you were between the rails, and could see and tell what track you were on?

A. Yes sir.

Q. Well otherwise than that was it pretty black and bad, Mr. Johnston?

A. It was pretty thick yes sir, indeed it was.

Q. It was enough to obscure the view generally, wasn't it?

452 A. Well yes sir, and then I could see a certain distance,—I could not tell.

Q. You knew every inch of that yard there at that time, didn't you?

A. Yes sir.

Q. And you could have told which track you were on if there had been no light at all, couldn't you,—found your way in that yard proctically blind, couldn't you?

A. I do not think I could. Take my eyesight away from me, and I would not know where I was.

Q. Your house was in the yard and your work was in the yard day and night, where you worked in the yard?
A. Yes sir.

Witness excused.

ROSCOE H. ZIMMER, called as a witness on behalf of the defendant, was first duly sworn, and testified as follows upon examination.

By Mr. Strode:

Q. What is your name?
A. Roscoe Zimmer.
Q. Mr. Zimmer you are the party who has been referred to as the engineer on this engine 213?
A. Yes sir.
Q. And Mr. Matthews, whose testimony has been read here was the fireman on that engine?
A. Yes sir.
Q. And you were the engineer?
A. Yes sir.
Q. How long have you been in the service of the Union Pacific Railroad as an engineer?
453 A. About 12 years.
Q. How long have you been in the service of the Union Pacific railroad as an engineer in the yards at Sidney, Nebraska, Mr. Zimmer?
A. Since February 1906.
Q. That is from February 1906, till January 1911?
A. Yes sir.
Q. You were one of the engineers in the switch yards at Sidney, were you?
A. Yes sir.
Q. How many switching crews did they have operating yard engines in the yard at Sidney during the day and night?
A. They had one crew in the day time, and one at night.
Q. Which one of the shifts do you have or did you have both at different times?
A. In January 1, I was on the day shift.
Q. January 1, 1911, you were on the day shift?
A. Yes sir.
Q. Had you, back to 1906, at any time, been on the night shift as well?
A. Yes sir.
Q. You recall I presume the condition of the weather on January 1st, 1911, the day of the accident to Mr. Huxoll?
A. Yes sir.
Q. Do you recall now Mr. Zimmer, where you got your engine that you were to use that day in the yards at Sidney?
A. Where I what?
Q. Where you got your engine?

A. Yes sir, I got it on number three track, south of the yard master's office where the dispatcher's office is now.

454 Q. Where did you usually or ordinarily get your engine in the morning when you went to work?

A. At that same place.

Q. Where would number three track be, with reference to the main line track as shown here?

A. Well, it would be south of the main line track.

Q. Is this number one, which is immediately south of the main line?

A. This is the main line?

Q. This?

A. Yes sir.

Q. Now there is a track south, is the One?

A. Yes sir.

Q. And Number Two is here, and a little south of number One?

A. Yes sir.

Q. And then number three would be still south of number two?

A. Yes sir.

Q. And where was the dispatcher's office with reference to the wash house; east or west?

A. At that time it was the yard master's office.

Q. Well where was it, east or west of the wash house?

A. That was the place right here, where it says office on this Exhibit 4.

Q. Now where was your engine with reference to this place marked office on Exhibit 4, where was it south of that?

A. About due south, yes sir.

Q. Then how many feet would it be beyond the main line, south how many feet was it from the main line to the third track?

A. Well, I could not exactly say.

455 Q. You remember now about how many feet there is between the main track and the first track south?

A. No sir.

Q. You do not remember?

A. No sir.

Q. Do you call that about 12 feet in there?

A. Yes sir, somewheres in that neighborhood.

Q. Is that the difference between the first and second track?

A. Yes sir, about the same.

Q. And then between the second and third track, about that distance?

A. Yes sir.

Q. And how wide is the track between the rails?

A. I could not say *now* wide it was.

Q. Well, about how wide, is it between two rails on a railroad track?

A. Well, I should judge in the neighborhood of five feet.

Q. Well, there would be fifteen feet,—36,—51,—and the main track would be five, fifty-six, and from the main track to the office about fifty feet, I guess, isn't it?

A. From where?

Q. From the office to the main track,—I think it is fifty, I do not know what it is,—well, it was out there?

A. Yes sir.

Q. And each morning you went to work at six o'clock?

A. Yes sir.

Q. And you continued until 6 at night?

A. Yes sir.

Q. And then the night shift came on?

A. Yes sir.

456 Q. Now on that morning you got your engine where you always got your engine when you went to work?

A. Yes sir.

Q. And at that time what engine was it that was turned over to you, where you always got your engine?

A. Engine 213.

Q. Who was operating that engine up to the time you got it?

A. A man by the name of Parks.

Q. And who was his fireman?

A. A man by the name of Couch.

Q. Is Couch here?

A. Yes sir.

Q. Where is Parks?

A. I don't know.

Q. Do they go out there with the engine and stay there until they are relieved?

A. They stay there until they are relieved.

Q. So they were on the engine when you and your fireman came out there?

A. Yes sir.

Q. Now what do you particularly do when you take the engine,—when you relieve the night shift in the morning at six o'clock,—what do you ordinarily do and what did you do on this morning with reference to looking over the engine, Mr. Zimmer?

A. I went clear around the engine and looked over it.

Q. For what purpose?

A. Well, one purpose was to examine the tires for flat spots and looking at our brake rigging. And such as that.

457 Q. Why do you do that, Mr. Zimmer. When the engineer gets off of the engine, why do you in receiving the engine look at its tires on the wheels and this brake rigging and other parts of the engine?

A. We do it to protect ourselves and see,—they have a rule that they reprimand a man or give him brownies if he puts a flat spot on a tire and we simply look at the tires to protect ourselves.

Q. So if the night man has flattened the tire, you so not want it slipped over to you?

A. No sir.

Q. You are held to account for the condition of the engine from the time you take it until you turn it back?

A. Yes sir.

Q. And you examined the engine yourself enough to know that when you took it there was none of these conditions, you would have to report, that you have mentioned?

Mr. Ross: The plaintiff objects to that question as leading. Sustained. Exception.

Q. Now where did you,—Mr. Matthews was your fireman I think you have stated?

A. Yes sir.

Q. Did he go with you to the engine?

A. I do not remember whether or not he went with me, but he was there about the same time I was.

Q. Now what condition did you find the engine in when you looked it over there?

A. In good condition.

Q. That is as far as obvious defects would be concerned, that you could detect from the ground?

A. Yes sir.

458 Q. Now was there anyway that you could determine whether defects existed in the engine, after you got up in your cab by just looking at the appliance?

A. Well, I could tell how much air pressure we had on it. By going up and looking at the guage in the cab.

Q. That is there is in the end of the cab right before you a guage that tells the condition of the air?

A. Yes sir.

Q. And would you look at that ordinarily?

A. Yes sir.

Q. And did you in this instance?

A. Yes sir.

Q. To see your air pressure was right?

A. Yes sir.

Q. And to see you had air pressure?

A. Yes sir.

Q. Now where did you take the engine from that point,—what did you do with that engine up to the time of this accident?

A. Well we switched cars there with her.

Q. In the yard?

A. Yes sir.

Q. Where did you make your first run with the engine to do any work from that point?

A. We went down on the house track and I believe,—we went east from where we were standing.

Q. What did you go down there for?

A. To place a few cars,—house cars, or something.

Q. Who was in this crew with you outside of Mr. Matthews?

A. Borton was yard master there, and there was two switchmen besides that,—Riggs and a man by the name of Hower.

Q. Which one of these two switchmen would be with the engine?

A. Riggs.

459 Q. Was Borton with the engine, or did he just have charge of directing where it should go, and what work it should do?

A. Sometimes he was with the engine, and sometimes he wasn't.

Q. Now go ahead and tell the jury what you did down there,—this was at the east end of the yard,——

A. East of where he were,—not at the extreme east end.

Q. Now go ahead and tell what you did down there,—this was at the east end of the yard,——

A. East of where we were,—not at the extreme east end.

Q. That is when you first moved the engine?

A. Yes sir.

Q. What work did you do at the house track?

A. As I said before we placed a few cars there.

Q. Did that involve your stopping your engine and starting your engine when you got there?

A. Yes sir.

Q. What condition did you find the brakes and things in at the time you stopped the engine?

A. When we got down and went to stop I noticed that the brakes didn't take hold the way they should.

Q. And that was down east of this point at the house track?

A. Yes sir.

Q. Then what did you do?

A. We made two or three switches there, I don't know how many, and then went back up on the track where we were standing,—where we started there in the first place. And I set the air and got down to look the engine over to see what was the matter, and I discovered that the brake pistons didn't work or wasn't working on account of the ice that was forze on them.

Q. Then what did you do?

A. Just left my brakes set, and I sent to the oil celler and got some waste and some head light oil and I put some waste on
460 a scoop shovel and poured the oil on it and touched a match to it, and put it on the brake cylinders and stood there until the brakes applied.

Q. What time was this now, that you did this?

A. I suppose this was right around eight o'clock, in the morning,——

Q. Now explain a little more clearly or fully, what you mean by the brake pistons and the brakes applying?

A. Well the brake pistons are what apply the brakes. What force the brake shoes up against the drivers.

Q. What did you have on this engine, an automatic air brake?

A. Yes sir.

Q. And also a straight air brake?

A. Yes sir.

Q. But we are talking now about the automatic air brake, Mr. Zimmer?

A. Yes sir.

Q. Now in connection with that automatic air brake, you have an air pump?

A. Yes sir.

Q. Then you have an appliance which compresses the air in a reservoir?

A. Yes sir.

Q. Now from the reservoir the air is applied to the brake pistons,——

A. From the reservoir, the air goes to the engineer's automatic brake valve.

Q. It goes to the brake itself doesn't it?

A. Yes sir.

Q. It starts from the pump and it is compressed and put in the air chamber?

A. Yes sir.

461 Q. And it goes from the air chamber to the brake on the wheel?

A. Yes sir.

Q. How *how* is it applied,—how does the air apply the brake on the wheel,—through what means,—these pistons you talk about that are in the air chamber at the brake on the wheel?

A. Yes sir.

Q. Where is the air chambers,—do these air pistons work in an air chamber or are they worked by steam or by the air?

A. By the air.

Q. Where is that,—do they work in a cylinder?

A. What?

Q. Do these pistons work back and forth in a cylinder?

A. Yes sir.

Q. They are forced in and out of a cylinder by the air?

A. Yes sir.

Q. Now the air then, when it reaches,—where does the air,—where is the air in connection with this air brake from the time it leaves the air pump to the time it reaches the cylinder that drives,—where these pistons are driving back and forth?

A. It is stored in the reservoir. And in the train line.

Q. Well it is all back of this cylinder, where these pistons are driven?

A. Yes sir.

Q. From the point that it leaves the air pump, it is all directed finally to this point where it is applied on these pistons in this chamber at the,——

A. Yes sir.

Q. It goes through however, this chamber at the reservoir,——

Mr. Rose: The plaintiff objects to that as leading.

Sustained. Exception.

462 Q. Now, where are these pistons you talk about,—where is that air cylinder, or chamber in which these pistons are located?

A. Right back of the saddle, underneath the front end of the engine.

Q. This picture, I think has been identified I think as Exhibit 5 that is the picture of the engine, isn't it, Exhibit 5,—engine 213?

A. Yes sir.

Q. Now can you see the brake cylinders from there?

A. No, but there they are right down underneath there, right in the middle of the engine.

Q. Show the locality?

A. I can show you where they are,—well they are right down there,—the other side of that drived, right immediately back of this here,—that is what we call,——

Q. Now you say it was about 8 o'clock when you thawed the ice off of these pistons?

A. Yes sir.

Q. How did that ice accumulate there, and where did it come from?

A. It came from a wash out plug underneath the engine,—underneath the boiler.

Q. Is there a plug underneath the boiler about the center of the boiler, where you let the water out, that is used to flush out the boiler?

A. Yes sir.

Q. And where was that plug, with respect to the location of these air cylinders, that apply the brake directly to the wheel?

A. Well, pretty nearly right over it.

Q. Now where was this ice with reference to this plug then?

463 A. It was on the brake piston.

Q. Oh, it was the plug above it?

A. Yes sir.

Q. So that it just came from the dropping of water out of that plug?

A. Yes sir.

Q. Where was this ice with respect to the air that was applied in the air brake?

A. Well the ice was nowheres near the air,—the ice was at the end of the brake cylinder.

Q. Where was the ice with respect to being on the inside or outside of the piston or cylinder there, where the air is applied direct to the brake?

A. It was on the outside.

Q. Do those pistons come out of the cylinder and go back while in action?

A. Yes sir.

Q. And where was it with respect to the cylinder, was it on the outside of the cylinder?

A. Yes sir, right on the outside.

Q. And on the piston rods that come out and go back?

A. Yes sir.

Q. Now did that ice interfere with the free use of these cylinders moving back and forth?

A. Yes sir.

Q. And that is where you applied the fire?

A. Yes sir.

Q From the waste?

A. Yes sir.

Q. You say you had your air set at that time, or applied on the brakes?

A. Yes sir.

464 Q. You applied the air, then you went down and applied the fire and heat to this condition?

A. Yes sir.

Q. When you had, by the application of this heat to the ice with the air brake being on,—what would be the result?

A. As quick as the ice melted, the brake set.

Q. What would be the result on the piston itself,—what would you observe?

A. I observed that when the ice melted that the brakes came on,—and the piston came out.

Q. Well the piston moved back and forth?

A. Yes sir.

Q. Then from that point on, and from that time on, what work did you do, with the engine, and what was being done there?

A. Well, we were switching some the same as we were before, and going, all the time from that, up to the time the accident happened.

Q. How did you start and stop that engine?

A. With the air brakes?

Q. From that time on?

A. I stopped with the air brakes.

Q. And about how much work did you do starting and stopping that engine from that time, up to the time that the accident happened, and what switching work did you do there, from about 8 o'clock up to the time of the accident?

A. Well, we were shifting cars around there, I could not say what we were doing all the time; I was working by signal and they were making up trains, I think, placing cars around in different places.

Q. And how did the air work,—how did the brake work during all that time?

A. Good.

Q. If it had not worked what would you have done with it?

465 A. I would have taken it around and have it repaired,——

Mr. Rose: The plaintiff objects to that as speculative and self serving.

Sustained. Exception.

Q. Well if the braking appliance had not worked there what would,—would you have continued to use the engine?

Mr. Rose: The plaintiff objects to that question as self serving testimony, and argumentative.

Sustained. Exception.

Q. Now coming down to the time of this accident, Mr. Zimmer, do you recall the fact when you started from the yards, just before the accident,—what end of the yards you had been in?

A. We were switching off of the house track, and getting some cars out there and putting them on track number three.

Q. Do you recall the fact that you did start finally, when you got through with that work, back on the main line?

A. We started east when we got through switching there. Went down to the east end of the yards and came up the main line.

Q. You came back on the main line?

A. Yes sir.

Q. Did you observe the steam and smoke that was through the *the* yards there in places during that morning?

A. Yes sir.

Q. Now in coming back west, after you had gone down to get onto the main line, which way,—*you* were you coming back up, or going, with the front end of the engine to the west?

A. Backing up.

Q. So that the tender was the leading end of the engine.

—. ——.

Q. About how fast were you going from the time you started on the main line back,—coming back west?

466 A. Well, I suppose when we left the east end of the main line I suppose we were going about four or five miles an hour, until we got up west of the stock yards.

Q. Well, what did you do there?

A. Well, we went onto a volume of steam there, and I shut the throttle off and let the engine drift and it came nearly to a stop, until it kind of cleared up,—and I opened the throttle again, and was proceeding about three or four miles an hour.

Q. Until you came up to the next cloud of steam and smoke?

A. Yes sir.

Q. Now how were you going through that,—the one that is about this water crane, that is involved in this accident?

A. As near as I can tell about three miles an hour.

Q. What was the condition of your bell that morning, or what use had been made of it?

A. We were ringing it all the time, we were moving.

Q. And was the air on the bell, in any way frozen?

A. No sir.

Q. Was there anything wrong at all, with the bell appliance so that it would not work?

A. No sir.

Q. When did you start ringing the bell, or did you ring it all the time while you were working in the switch yards?

A. All the time we were moving, yes sir.

Q. From the time you started at 6 o'clock that morning until the time of this accident, when you were moving, in and about the yards there, the bell was ringing?

A. Yes sir.

Q. Would you have operated the engine if the bell had not been ringing?

Mr. Rose: The plaintiff objects to that question as self serving and speculative.

Sustained. Exception.

467 Q. Well, you know that Matthews says that the bell cord was broken, and that the air was frozen, and that the brakes were frozen, so that you could not apply the brakes. I want to get your attention specifically to the condition of the brakes, and the bell at the time of the accident before the accident, about how much use had you made of the brakes and bell by the applying of air prior to this accident?

A. Well, I used the brakes every time we stopped.

Q. Did you stop by any other means than the use of the brakes?

A. No sir.

Q. Did the brakes when you applied the air at all times after you had thawed off this ice you told about, respond to the air?

A. Yes sir.

Mr. Rose: The plaintiff objects to that question as leading and suggestive.

No ruling.

Q. And if the brakes or the bell on that engine, for switching purposes in the yard, were out of order, so that neither would work, was there any rule or requirement of the company that would require you to report the engine as failing, and take it into the round house?

A. Yes sir, we would be supposed to take it around there, and have it fixed or get another engine.

Q. That would be required of you by the company, and by the rules of the company in the operation of a yard engine?

A. Yes sir.

Q. You would not be permitted to operate a yard engine through the yards there, with a bell appliance that was not in working order?

468 Mr. Rose: The plaintiff objects to that question as a mere repetition and already gone over.

The Court: That has been gone over. Sustained. Exception.

Q. And the same would be true with the brakes, or any other appliance or device on the engine, if it got out of order and would not work?

A. Yes sir.

Q. Was any part of the air appliance on the brake,—that is, I mean that part with the air itself,—that is involved in the use of the air itself,—or in the bell machinery, frozen at any time?

A. No sir.

Q. Or affected at any time by the cold that morning?

A. No sir.

Q. Now who was on the engine as you came up the track west, into this steam where the accident happened?

A. Who was on the engine, you say?

Q. Yes sir.

A. Switchman Riggs and Matthews and myself.

Q. Where was Riggs on the engine?

A. He was standing on the steps in the gangway between the engine and the tender.

Q. Calling your attention to Exhibit 10, Mr. Zimmer, I will ask you to state if you recognize that as a picture of the engine 213?

A. Yes sir.

Q. Does that look like the engine?

A. Yes sir, it does and Riggs stood right there, (Indicating the gangway.)

Q. Now in this picture there is some steps on the side of the cab,—at the end of the cab, immediately before the end of the tender,—or immediately ahead of the tender, Mr. Zimmer?

A. Yes sir.

Q. Those steps are shown here in this picture?

469 A. Yes sir.

Q. The steps you refer to are marked at the end of the line one, on this picture?

A. Yes sir.

Mr. Strode: The defendant offers in evidence this exhibit 10, for the purpose of showing the steps referred to in the witness' testimony.

Mr. Rose: I insist that it should be offered for all purposes.

Mr. Strode: All right.

Exhibit 10, received in evidence and shown to the court and jury, and a copy of the same or the original is hereto attached and made a part hereof.

Q. Will you show the jury here Mr. Zimmer, the steps that you refer to in your testimony?

A. There they are, right there. (Indicating)

Q. Now, Mr. Zimmer, Mr. Riggs, you say was standing on these steps that you have identified here in this picture of the engine?

A. Yes sir that picture shows headed west, doesn't it? and Riggs was standing on the steps on the south side of the *ending*, and the engine was backing up. It was on the steps on the south side of the engine that he was standing on.

Q. Well, that engine is backing up, isn't it?

A. Yes sir, if you turn it that way, that is all right.

Q. How long had he ridden on that step?

Mr. Comstock: The plaintiff objects to that question as assuming the fact that that was the step that he was on. (Question withdrawn.)

Q. Well, the steps on the side of the engine, or the cab, that you talked about?

A. I think he got on there at the closing of the main line switch, when we started back up the main line.

Q. Is there a grab iron or a hand hold there on the side of

470 the cab or the side of the tender?

A. There is one on each.

Q. So that a man standing on the side of the steps takes hold with his hands on the cab, and on the tender?

A. Yes sir.

Q. Does this picture, Exhibit 10, of engine 213, show the window in the cab, on the engineer's side, as well as on the fireman's side?

A. Yes sir.

Q. This picture wasn't taken in the winter time but the summer time?

A. I could not say.

Q. But the window was in the cab just the same as in the winter time, if this was summer?

A. Yes sir.

Q. Do you know about the size of the window in the cab?

A. No sir, I could not say.

Q. This is a picture of the wi-dow, (Indicating)?

A. Yes sir.

Q. Do you know the size of that cab?

A. No sir.

Q. Well, do you know about how long the cab is here on the side?

A. Why I suppose in the neighborhood of eight feet in length.

Q. That window would be about how long?

A. Well the way the window shows there, it would be four and a half to five feet in length.

Q. Now that is the window on the side, isn't it?

A. Yes sir.

Q. Now is there a window in the front end of the cab?

A. Yes sir.

Q. A little window at the front end?

A. Yes sir.

471 Q. And where is the engineer's seat in the cab?

A. Here, a little that way from the corner, or right close to the corner,—some are right in the corner and some are right close in the cab,——

Q. Right along by that window?

A. Yes sir.

Q. Now in either that engine or any other engine, Mr. Zimmer, in the yards there, in switching in the yards there, how do you see when you are backing up,—how do you see being the engineer,—what position do you have to take in the cab to see where you was going, when you are backing up?

A. I have to have my head out of the side window.

Q. That is, out of the window that is show- here in this picture?

A. Yes sir.

Q. At the end of the line marked 2?

A. Yes sir.

Q. That is the cab window?

A. Yes sir.

Q. That window you said was about five feet long and about how high?

A. Oh it must be probably three feet in height.

Q. Now in any engine used in the yards when you are backing up, could you see the track excepting by looking out of the window?

Mr. Comstock: The plaintiff objects to that question as leading. No ruling.

A. No sir.

Q. No matter what kind of an engine it was?

Mr. Comstock: The plaintiff objects to that question as leading. Sustained. Exception.

472 Q. This engine here shows a coal box immediately behind the cab?

A. Yes sir.

Q. That square box?

A. Yes sir.

Q. And it shows a round tank in which the water is kept?

A. Yes sir.

Q. And the square box is where the coal is kept?

A. Yes sir.

Q. This picture does show the height of the coal box compared with the height of the cab, and the engineer's seat, looking out of the window?

A. Yes sir.

Q. Now on other engines that are used in the yard at Sidney did they have the same kind of a coal box,—do the engines have practically the same kind of coal boxes?

A. Practically the same, yes sir.

Q. They are all square boxes?

A. Yes sir.

Q. Do they all stay in about the same position as height,—relative height compared to the position of the window and the engineer's seat by the window?

A. A good deal the same, yes sir.

Mr. Rose: Are you talking about road engines or switch engines?

Mr. Strode: The engines that are used for switching in the yards there.

Q. In that yard you had occasion to use different kinds of engines, since you have been switching in the yards since 1906?

A. Yes sir.

473 Q. And have you used what is known here as the ordinary switch engine?

A. Yes sir.

Q. A light engine?

A. Yes sir.

Q. And to what extent have you used other engines in your switching in the yards there?

A. We have used one road engine up there off and on for the last five years.

Q. What engine number was that?

A. We had the 1605, 1606, and the 1601, and the 1608 and the 1615.

Q. Those are all engines that were used there in the switch yards for switching purposes?

A. Yes sir.

Q. And all of them of the same type as in this engine?

A. A good deal of the type.

Q. And of what you call road engines?
A. Yes sir.
Q. And then you have one or two what you would call regular switch engines?
A. Well we have,—we had one regular switch engine.
Q. That is a lighter engine than these?
A. Yes sir.

Mr. Rose: The plaintiff objects to these leading questions. (No ruling.)

Q. Now just describe what your position would be in these regular *switchines* that you referred to, and what your ability would be to see the track back of you, if you were backing up. If you were sitting down in your seat in the cab, and not looking out of the window?

A. Looking out of the,—out of which window do you mean?

474 Q. Not looking out of the window? If you were using your regular switch engine here, and weren't looking out of the window, and were backing up and sitting down on your seat, on the engineer's side, what would be your ability to see the track?
A. I could not see the track, Looking straight back.
Q. Could you see it without looking out of the window?
A. No sir.
Q. Why?
A. The coal tank comes up there so that you could not see over the coal tank.
Q. Well could you see if you stood up in the cab, could you see over the coal box, and see the track, if you were backing up?
A. No sir.
Q. Why?
A. Why the coal tank or coal box is too high, and you could not see the track anywheres close to the engine at all.
Q. Is the back end of that engine used,—or could it be used on this engine, or any other engine for the purpose of looking out over the track where you are backing up?
A. No sir.
Q. What part of the engine do you use, and how do you use it in looking out on the track, where you are backing up?
A. We have to get our head out of the side window.
Q. And that is true of all engines?

Mr. Rose: The plaintiff objects to that question as leading.
Sustained. Exception.
12 o'clock Noon, October 20th, 1913, court adjourned until 2 o'clock P. M. same day.

475 In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Adm'x, etc., Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

And the defendant, in the above entitled cause, in the district court of Lancaster County, third judic-al district of Nebraska, having within the time heretofore allowed by the court for that purpose, reduced to writing, in this its bill of exceptions, consisting of Two Volumes of which this is Volume I all of the testimony and evidence adduced or offered on both sides of the before named cause, in the before named court, all of the objections, with the grounds therefor, made to the admission of testimony and evidence, all of the rulings of court on such objections, and all of the exceptions to such rulings made and taken at the time, and having served the same on the arrorneys for the above named Plaintiff, according to law, for examination and amendment; and the said bill of exceptions being now here before me the undersigned judge, before whom said cause was tried, on motion of the attorneys for the Defendant that the same may be settled, allowed, signed, sealed, and made a part of the record in said cause in the said court,

Now I, the said judge, do hereby certify that this bill of exceptions contains all of the testimony and evidence adduced or offered by the plaintiff and defendant on the trial of said cause, all of the objections to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time, and I do hereby order that it be made a part of the said record in the said cause in the said court.

476 *Within Bill Amended as Requested by Plaintiff.*

Done at Lincoln, Nebraska, this 20th day of March 1914.
P. JAS. COSGRAVE, *Judge.*

I, Calvin A. Emery, one of the stenographic reporters, in and for the third judicial district of Nebraska, hereby certify that the above and foregoing is a true transcript and bill of exceptions of the evidence offered and given by the respective parties on the trial of the above entitled cause, together with all objections of the said parties, the rulings of the court thereon, and the exceptions of the said parties thereto, according to my skill. And that the said bill of Exceptions is contained in two volumes, of which this is volume one.

CALVIN A. EMERY, *Reporter.*

Fees for Bill of Exceptions $286.30.
Paid by Union Pacific R. R. Co.
Date, 3/20/14.
C. A. EMERY, *Reporter.*

477 January 23, 1914.

This bill of exceptions was delivered to Mr. E. C. Strode, Attorney for the defendant in the case of Huxoll vs. the Union Pacific Railroad, on the 19th of January, 1914. On the 20th day of January Mr. Strode received the Rules of the Supreme Court of the state of Nebraska in force February 1, 1914. Mr. Strode called my attention to changes which were made in the manner of preparing bills of exceptions. Inasmuch as this bill of exceptions was already bound and delivered prior to February 1st, although not filed in the Supreme Court, I called upon Mr. Lindsley, Clerk of the Supreme Court for the purpose of ascertaining whether or not it would be necessary to take this bill of exceptions apart and make the marginal notations as provided in the new rules. Mr. Lindsley assured me that under the circumstances he was of the opinion that such an action was wholly unnecessary.

For this reason I am attaching this notation, in order that when this bill is filed in the Supreme Court the circumstances will be understood.

CALVIN A. EMERY, *Reporter.*

(Indorsed:) 18377. Huxoll v. U. P. R. Co. Bill of Exceptions, Volume I. Supreme Court of Nebraska. Filed Apr. 7, 1914. H. Lindsay, Clerk.

(Indorsed:) Clerk's Office, District Court, Lancaster County, Nebraska. Filed Mar. 20, 1914. J. S. Baer, Clerk Dist. Court.

478 I, J. S. Baer, clerk of the district court of Lancaster county, within the third judicial district of Nebraska, do hereby certify that this is Volume Two, of the original bill of exceptions, consisting of two volumes, filed in the office of said clerk in said cause.

In testimony whereof, I hereunto set my hand, and affix the official seal of said court, this 20 day of March, 1914.

J. S. BAER,
Clerk District Court,

[SEAL.] By W. C. BURCHAM, *Deputy.*

Received of Defendant, for examination and amendment, a draft of a bill of exceptions consisting of Two Volumes, of which this is volume Two in the following case of Ella J. Huxoll, Adm'x, etc., plaintiff, vs. Union Pacific Railroad Company, defendant, tried in the district court of Lancaster County, at the September, 1914, term.

Dated, March 2, 1914.

WILMER B. COMSTOCK,
Attorney for Plaintiff.

— herewith return the draft of the bill of exceptions in the case of Ella Huxoll, Adm'x, etc., plaintiff, vs. Union Pacific Railroad Company, defendant, submitted on the 2nd day of March, 1914,

and propose amendments thereto as follows: as shown by typewritten sheet hereto attached.

Dated, March 11, 1914.

WILMER B. COMSTOCK,
Attorney for Plaintiff.

479 That amendments to the bill of exceptions in the case of Ella Huxoll, Adm'x vs. Union Pacific Railroad Company be made as follows:

1. That all of page 217 after the name "Mr. Strode" appears for the last time on said page, all of page 218, and that portion of page 219 down to the first word "overruled" on said page, be eliminated, for the reason that the same was not made in the record at the time the trial was being had, and is not a part of the oral proceedings at the time of the trial, and that the same language above referred to, as appearing on pages 217 and 218-219, which occurs on pages 219 to 265, inclusive, be eliminated, for the reason that the said statements did not occur at the trial and at the time of the trial were not made a part of the record at the time the record was made.

2. Substitute the word "know" for the word "thought" in line 4 from the bottom of page 435.

3. That immediately before the words "Mr. Comstock" on the last line on page 442, the following be inserted: "Mr. Comstock: 'The plaintiff offers in evidence Rule No. 9 on page 12 of Exhibit 3.' Mr. Strode: 'The defendant objects to that offer as incompetent, irrelevant and immaterial.' Overruled. Exception. The rule referred to and offered by Mr. Comstock, received in evidence and read to the court and jury as follows: 'Night signals must be displayed from sunset to sunrise. When weather or other conditions obscure day signals, night signals must be used in addition.' "

Dated this 11th day of March, 1914.

WILMER B. COMSTOCK,
Attorney for Plaintiff.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Adm'x, etc., Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

480 *Defendant's Bill of Exceptions.*

Be it remembered that on the trial of this cause in the district court of Lancaster County, Nebraska, before Honorable P. Jas. Cosgrave, one of the judges of said court, and a jury, at the September, 1913, term thereof, to-wit: on the 14th to the 23rd inclusive days of October, 1913, the following evidence and testimony was introduced, and given to the court and jury, by the plaintiff and in her behalf and by the defendant and in its behalf, together with the objections of the said parties to the introduction thereof. The rulings of the

court thereon, and the exceptions of the said parties thereto by them respectively noted, as hereinafter set forth, in Two Volumes of which this is Volume Two.

Appearances:

Stout & Rose, Hoagland & Hoagland, W. B. Comstock, appearing as attorneys for plaintiff, and Strode & Beghtol, E. P. Miles, and Scandrett appearing as attorneys for defendant.

Two O'clock P. M.—OCTOBER 20th, 1913.

Court met pursuant to adjournment, and the following proceedings were had and done.

ROSCOE ZIMMER, recalled as witness for the defendant testified as follows upon examination.

By Mr. Strode:

Q. Where do you live?
A. Sidney.
Q. You did live at North Platte?
A. Yes sir.
Q. And knew Mr .Huxoll and his family?
A. Yes sir.
Q. You were neighbors of theirs?
A. Yes sir.
Q. Now Mr. Zimmer, tell the jury about this accident to Mr. Huxoll, what you saw in approaching this place where he was injured; how you learend of the accident, and all about it. What you were doing, and tell them the whole story about it?
A. Well, we were down at the east end of the yards backing up the main line, and we got up a little west of the stock track alongside of the stock track there, and we came right up close through
481 the dense steam and fog and snow, and I slowed down, and shut the engine off and the engine drifted along until it lightened up a little, until we could see a little further, and I gave the engine a little steam and I proceeded on up to where the accident happened at the rate of about three miles per hour I think. And the first I knew anything about it, Switchman Riggs said, "Hold her" or "Stop her" or something like that, and I applied the air brake and put on the emergency and reversed my engine and stopped, and that is all that was done until Mr. Huxoll was taken out.
Q. Did you get out of your engine cab, or did you stay at your post of duty in the cab?
A. I got down out of the cab and I started down and I met another engineer by the name of Thomas Orton and he said, "get back up into the engine, we want you to move her; Mr. Huxoll is under the engine, and we want to move her". And then I got back up and then he said, "Don't move her, we will have to disconnect the brakes to get her out.

Q. What was done in the matter *od* disconnecting the brakes do you know?

A. I do not know who disconnected them, I know this foreman Schroeder said to me about the time that Orton had got the tools, he said, "Release your brakes, we have to disconnect it.

Q. Schroeder is here, isn't he?

A. Yes sir.

Q. What position did he have?

A. I believe he is car foreman or head car inspector.

Q. When he told you to release the brakes, what did you do?

A. I released them.

Q. And what brakes did you release?

A. All brakes connected with the engine and tender.

482 Q. And how did you release the automatic air brake?

A. By throwing my brake valve handle ahead in full release.

Q. Is there a handle or a little short lever or something that you pull over to apply the automatic air?

A. Yes sir.

Q. That is the way you do that?

A. Yes sir.

Q. Pull it over and it throws back, when you release it?

A. Yes sir.

Q. And where is this handle or lever that you use in applying the automatic air brake?

A. It is close to the boiler head,—and as the engine you would be riding on, in the direction you were going,—faced that way,—(Indicating),—it would be to your left.

Q. If you are going backwards,——

A. Well the way I was going I was looking west, and backing west, and the brake valve handle was to the right of me.

Q. When you got this signal or when Riggs said to you what you testified here that he said, giving you the first notice of anything being wrong,—what was your position,—where were you at that particular time?

A. I was standing up lo-king outside the window, looking west.

Q. That is the window that is shown on this photograph, on the side of the cab, is it?

A. (No answer.)

Q. Is the window which is shown in Exhibit 10, where the line is running right down from the figure two?

A. Yes sir.

Q. What then did you have to do in order to stop the engine and apply the brakes?

A. I had to pull myself back into the window, and reach over and shut off the throttle and apply the brakes. I took hold of the reverse lever and put her in the forward motion——

483 Q. The throttle is the appliance there that throws on or off the *the* steam or power that runs the engine?

A. Yes sir.

Q. Now what did you do with the throttle?

A. I shut it off.

Q. And what did that do?

A. That shuts the steam out of the cylinders.

Q. That got the steam out of the cylinders so that there was no longer power?

A. Yes sir.

Q. Then what was the next thing you did after doing that, after shut-ing off the throttle?

A. I took hold of the automatic air brake handle and applied the brakes.

Q. How?

A. By throwing the lever back.

Q. It pulls back?

A. Yes sir.

Q. And then what did you notice if anything ab-ut the action of the brakes?

A. I noticed we commenced to stop, and I took hold of the reverse lever and put it in the forward motion.

Q. How much air did you use,—in using the automatic air brake when you pulled it back,—to what extent did you use it?

A. I used all I had,—put it on what was called the emergency.

Q. You threw it clear back?

A. Yes sir.

Q. So that it was all the air there was?

A. Yes sir.

Q. What did you observe about the brakes taking hold at that time?

A. I observed that the engine slowed down.

Q. Then the next move was what?

A. I put the reverse lever in the forward motion.

Q. What does that do?

A. It has a tendency to stop the engine a little quicker.

484 Q. Does that let the steam in, or start to drive the engine the other way?

A. There is nothing to do with the steam when your throttle is shut off.

Q. Does it have a tendency to drive the engine the other way?

A. When there is no steam working it doesn't, but it has a tendency to change the link motion.

Q. You will have to tell me what the link motion is, I don't know anything about that.

A. It is covered by the reverse lever and it has a tendency to stop it a little quicker by reversing the engine.

Q. Did the engine then stop?

A. Yes sir.

Q. Did you see Mr. Huxoll at any time before the accident in the track?

A. No sir.

Q. Did you know that he was in that track, or anywheres near the track when you came down there?

A. No sir.

Q. What is the fact as to whether you stopped that engine as quickly as you could stop it?
A. What did you say?
Q. What is the fact as to whether you stopped that engine as quickly as you could stop it?
A. I stopped it just as quick as I could.
Q. Is there anything further that you could have done that you didn't do to stop quickly?
A. I didn't hear what you said.
Q. Was there anything further that you could have done there to stop, that you didn't do?
A. No sir.

485 Cross-examination.

By Mr. Rose:

Q. Mr. Zimmer you say you had your head out of the window, did you?
A. Yes sir.
Q. And your shoulder out?
A. Yes sir.
Q. Was there a wind, a chilling wind?
A. What?
Q. Was there cold outside?
A. Yes sir.
Q. And you were looking west at the leading end of your engine were you?
A. Yes sir.
Q. And how long had you been in that position during this trip from the east end of the yards?
A. All the time.
Q. You had kept your eye right out ahead, on the track, had you?
A. All except the time when we,——
Q. All except the time when you slowed up at this first steam?
A. Yes sir, all except the time when we slowed up at this first steam I looked around and shut off the throttle.
Q. How do you account for the fact that you didn't see that Huxoll was on the track.
A. That I could not see.
Q. How far could you see the track ahead to be clear,—I mean towards the leading end of your engine?
A. Towards the direction we were going?
Q. Yes sir. When you struck Huxoll how far could you see the track at the rear of your engine, the clear track?
A. I could not see the rear end of the tank,—I could not see that far.
Q. As far as you were going then, you were just going blind without knowing what you were running into,—that is a fact, isn't it?
486 A. Well, we were backing up the main line slow and carefully.

Q. But you could not see what you were running into?

A. No sir.

Q. You did not know whether or not you were going to get into anything?

A. No sir, I didn't know.

Q. Do you say the window at the north side of your cab,—no, you were at the other side, weren't you?

A. I was on the south side of the cab.

Q. You were on the south side of the cab?

A. Yes sir.

Q. You say that south window was open now?

A. Yes sir.

Q. And that you had your head leaning out?

A. Yes sir.

Q. Do you recall the circumstances of Mr. Hoagland's taking your deposition in this same case at Sidney on the 28th of June last year,—1912?

A. Do I what?

Q. Recall giving a deposition?

A. I remember giving a deposition,—but what date it was, I could not say.

Q. Well, it was on or about that time, wasn't it,—June of last year?

A. Yes sir.

Q. Who examined you at that time, do you remember that?

A. Who what?

Q. Who examined you,—who asked you the questions in behalf of Mrs. Huxoll there?

A. Mr. Hoagland.

Q. And do you remember who represented the railroad?

A. Why I think it was a man by the name of Shehan, or something like that.

Q. They called him Johnny, didn't they?

A. I never heard them call him Johnny.

Q. You were sworn as a witness at that time too, weren't you?

487 A. Yes sir.

Q. To tell the truth?

A. Yes sir.

Q. I will ask you if you didn't upon the occasion mentioned, when that deposition was taken, in answer to the following question, relating to the very trip on which you ran Mr. Huxoll down, this question "Do you think you were about opposite the water crane when you heard this noise?" to which you answered, "No, I think we were a little west", you need not mind that question, were you asked this question. "Were you looking out when you were running the engine, in the direction in which you were going?" and to that didn't you answer, "No sir"?

A. Now there is a mistake there, I didn't answer that question that way.

Q. Do you say now you didn't so testify?

A. Do I do what.

Q. Do you say now you didn't so testify?

A. I answered that question, that I was looking out.

Q. Did you, or didn't you answer that question, "No sir"?

A. No sir, I didn't answer it, "No sir".

Q. Was the next question immediately following it propounded by Mr. Hoagland as follows: "You could not see?" and did you not to that question, answer, "No sir"?

A. I do not quite understand that question.

Q. Then you would not say whether that question was asked you, and you gave that answer, is that what you mean?

A. Well, what was the question you asked me.

Q. In connection with your question as follows: "Were you looking out when you were running the engine, in the direction in which you were going?" and to that, didn't you answer, "No sir". Now, I asked you if you answered that, "No sir", and then I asked you if Mr. Hoagland didn't continue, "You could not see?" and didn't you answer that "No sir"?

488 A. That I could not see?

Q. Yes sir.

Mr. Strode: I do not think that the witness understands what you are getting at.

Mr. Rose: Well I think I have been fair with him, and told him about it, and I want to know if those two questions were given to him that way and he answered that way?

A. I do not know but what I did answer, that I could not see.

Q. Mr. Zimmer, how long would it take to stop an engine like that, if the air was working right, and you had applied it promptly, in answer to a signal, and put the emergency brake on, and your,—and reversed your engine, if the light engine was going say, at the rate of six miles an hour, under the conditions there?

A. Under those conditions it would probably take you from 20 to 40 feet to stop it. The way things were that day.

A. I will ask you if you were asked this question by Mr. Hoagland at the taking of the deposition referred to? "How quick can you stop an engine going six miles an hour," and if you didn't answer, "in good weather you can stop it in ten feet"?

A. Yes sir.

Q. Is that a fact?

A. I think so, yes sir, in good weather on a dry rail.

Q. Did you have a dry rail at this time?

A. No sir.

Q. What was on the rail?

A. Snow and frost.

Q. Suppose there is a little snow on the rail, that is falling and in cold weather, and it is lighting on the rail, when the temperature is fifteen degrees below zero is the snow under those circumstances, an aid or a hinderance to the stopping of the engine?

A. It is a hinderance.

489 Q. At that temperature, wouldn't the snow in itself form an additional obstruction that would aid the brakes in the process of stopping ?

A. No sir.

Q. Wouldn't that furnish resistance instead of aiding in the movement of the engine?

A. It wouldn't when it came to the braking power, no sir.

Q. How far would an engine have to go under those conditions to be stopped, if you applied the brakes. It had only gone three miles an hour?

A. Well from about twenty to fourty feet under those conditions.

Q. Doubling the velocity of the engine, wouldn't make any difference at all in the quickness of the stop?

A. Do you mean the speed of the engine.

Q. Yes sir?

A. Yes sir.

Q. What difference would it make?

A. Well you could stop quicker if you were going at a slow rate of speed than if you were going fast.

Q. Well how do you explain the fact then that you put twenty to forty *miles* in the case of an engine going six miles an hour, and also twenty to forty feet when it was going three miles an hour.

A. No answer.

Q. Did you make a mistake there one time, or the other?

A. Well there would not be such a terrible lot of difference, there would be some of course.

Q. Well, which way would the difference be.

A. Well you could stop it——

Q. In a shorter distance when it was going three miles an hour?

A. Yes sir.

Q. There would not be the momentum or force in an engine going three miles an hour as there was an engine going six miles an hour?

A. No not quite.

490 Q. There would not be as much time to travel over the ground, — there would be more time to travel over the ground if the engine was going three miles an hour than there would be if it was going six miles an hour?

A. I do not suppose you could stop it as quick if it was going six miles an hour.

Q. Going at the rate of three miles an hour, when you take the slowness of the engine into account, wouldn't the engine stop almost instantaneously when or as soon as the brakes took hold?

A. Well, they would in ordinary weather, and good weather, but on this day these brakes had snow,—all the brakes had on the north side of the engine.

Q. Were the wheels hot, so that it melted the snow?

A. No sir, not melted snow, but snow.

Q. The wheels didn't get slip-ry from being moist that day?

A. No, that is not from any thaw from the snow.

Q. Well when you had the brake shoe in contact with the tire of the driving wheel if the brake shoe wasn't slippery, and the tire

of the driving wheel wasn't slippery, what would prevent you from making a good stop on a day like that?

A. Well the snow on the brake shoe on a day like that. The shoe doesn't hold as well on a day like that as it does——

Q. The contact with the tire of the brake show would still leave th-s snow in there, leave it slippery, when it wasn't too wet?

A. Yes sir.

Q. How would the snow get in between there?

A. It would pile in onto the brake show and then drop down along the shoe.

Q. Now it would not take so long then to stop it at three miles an hour, as it would to stop the same engine going six miles an hour ?

A. Not quite I guess.

Q. It would not take as much time?

A. Do you mean it would not take as much time to apply your brakes?

491 Q. No, I mean there are two elements here. It would not take so much time to overcome the momentum of three miles an hour as it would to overcome the momentum of six miles an hour, would it?

A. No sir.

Q. In addition to that, if you figured on the same identical period of time, if it was going three miles an hour, it would only go half as far as it would in the same time, at 6 miles an hour?

A. Well, I do not know about that.

Q. Isn't it a fact that it would only take about one fourth of the resistance on the tire of the driving wheels to stop an engine, going three miles an hour, as it would going six miles an hour.

A. I could not say.

Q. As a matter of fact you could ordinarily stop an engine going at quite a high rate of speed, within forty feet, if it was running light, with the power driving wheel brake?

A. Yes sir, in good conditions.

Q. You could within forty feet, after you applied the air, in the emergency stop, bring an engine that was going twenty-five miles an hour to a dead stop, couldn't you, an engine of this weight, and having eight driving wheels, running light?

A. Well, I do not know whether or not you could.

Q. At what rate of speed.

A. At that rate of speed.

Q. How long do you think ordinarily you could stop an engine of this character, equipped with a sufficient and efficient power driving wheel brake, if it was going at ten miles an hour, when you applied the brake?

A. Well, I could not exactly say how quick I could stop it.

Q. Could you say how quick you could stop an engine in like conditions, going at the rate of 15 miles an hour?

A. No, I could not.

Q. Now as a matter of fact, you didn't bring this engine to a stop

upon this particular occasion, in answer to the signal of Mr.
492 Riggs, within forty feet, after you had received the signal, did you?

A. Well, I stopped that engine, just as quick as I could,—I done all that——

Q. No, but I asked you to give us an idea of about how far you think it went?

A. I do not know that I went forty feet.

Q. Well, what is your best recollection, now as to whether you didn't go forty feet?

A. Well I was in no position hardly to say how far I did go. I took myself right out of the window, and shut off the throttle, and reversed the engine, and how far we went, I do not know for sure.

Q. You had seen the water crane as you passed by it, didn't you?

A. Yes sir.

Q. Now at the time Riggs gave you this signal, you also noticed a grinding under the engine, didn't you?

A. Not at the time he gave the signal.

Q. Didn't you right at the very time that he gave you the signal, notice a grinding?

A. No sir.

Q. And didn't you think you had run through a switch and your engine was on the ground—was on the rails?

A. That wasn't at the time that Riggs gave me this signal. He gave me the signal before I felt the grinding.

Q. It was before you stopped?

A. Yes sir.

Q. Well, didn't — notice the grinding at the very time you got the signal?

A. No sir.

Q. I will ask you, if, upon the occasion previously referred to, in June, 1912, at the taking of your deposition, Mr. Hoagland didn't ask you the following question, "Did you think when he gave you that signal" (Referring to the signal received from Mr. Riggs), "That you were to stop at the switch?" and did you not
493 answer that question as follows: "I heard the grating under the engine about the time he gave the signal. I thought we were on the ground. I thought the switch had been run through and we were on the ground."

Mr. Strode: The defendant objects to that question as not an impeaching question, and saying just what the witness said now.

Overruled. Exception.

A. Yes sir, I thought we were on the ground, and it was when I felt the grating.

Q. Well, I don't want any explanation about that. I have asked you for your version and you do not need to explain. How close did you go to this crane when you were going by, on the main line track?

A. I think it is about 6 feet off from the main line—off from that track.

Q. And you could not see the crane as you went by?
A. No sir.
Q. How do you account for the fact that you could not see the crane—what obscured it?
A. Well the whole north side of the cab.
Q. You did not know when you went by the crane at all, as a matter of fact at all did you?
A. No sir.
Q. Now as a matter of fact you didn't use a road engine very often in switching in the Sidney yards, did you?
A. Well, we used a road engine about half the time in the last five years.
Q. Well at this time, you didn't use,—at the close of 1910, and the beginning of 1911, you didn't use a road engine very often, did you?
A. Why, about half the time?

494 Q. I will ask you if upon the occasion of your former testimony by deposition, Mr. Hoagland didn't propound to you this question, "About what proportion of the time were you using a road engine for yard service in the Sidney yards at that time?" and if you didn't make the answer, "Not very often."
A. Well we didn't those kind of road engines.
Q. Just say whether you gave that answer the way it is there or not?
A. Yes sir.
Q. Now how long did you say you had been in yard work?
A. Since February, 1906.
Q. Isn't it a fact, Mr. Zimmer, that an association of employees, and an association of railroads, that comproses practically all the railroads of this country at that time had agreed upon how a switch engine should be equipped, and it was a matter that was well understood and conformed to generally all over this country, including the switching operations of the Union Pacific?

Mr. Strode: The defendant objects to that question as immaterial irrelevant and incompetent, and improper cross examination.
(Question withdrawn.)

Q. What is the virtue in having a short tank and a sloping tank for switching purposes—what virtue is there in that?
A. Well, the engine is not as large as another engine, and they have a tank in proportion to the size of the engine.
Q. That is your full answer to that is it?
A. Yes sir.
Q. That is the reason it slopes is it?
A. What?
Q. That is the reason it slopes downward, towards the track from the viewpoint of the engineer, is it?
A. Yes sir.
Q. Just on account of the size?
A. Well, yes sir.

Q. And as a yard engine man, you know of no other reason why it is constructed that way?

495 A. Well, there is another reason why it is constructed that way,—when you are backing up and looking out the back window, you can see a high car on the track.

Q. Can you see the track at a nearer point with that kind of a tank than you could on an engine with a coalbox and tank that is on 213?

A. Now you want to know if I can see it closer?

Q. Yes sir. Which style of engine equipment can you see the track closer?

A. On the 213.

Q. You may explain why.

A. You can't see the track on either engine,—you must put your head out the side window to see the track, and you can see the track closer on the 213 than you can with the regular engine,—the switch engine.

Q. That is to say, that the obstruction is not so great on the back of the road engine,——

A. I say you can see closer to the track from the center of 213 than you can on the switch engine.

Q. Then the longer the tank the clearer your view is of the track beyond the tank?

A. No sir, I didn't say that.

Q. Well, which is the longer tank?

A. The 213.

Q. Well, how does the length of the tank affect your vision?

A. It is not the length of the tank; it is the build of the tank.

Q. I asked you if the length of the tank affected it,—that element alone,—how would that effect it?

A. I don't know particularly that would effect it, the reason you can see further on the 213, than you can on the switch engine is for the reason that the 213 has a Vanderbilt tank,—a round tank.

Q. Well it stands behind a square coal box, and a large one?

A. Yes sir.

496 Q. And the coal box on engine 213 is a much larger coal box than the switch engine?

A. Yes sir, it holds more coal.

Q. And it is both taller and longer, isn't it?

A. Well, it is taller, I can't know about the length.

Q. And it is built for a service that requires a supply of coal for a longer trip than the switch engine itself?

A. Yes sir.

Q. And it is built with a water tank that requires a supply of water for a longer trip than is required of the switch engine?

A. Yes sir.

Q. Now, isn't it a fact that it was the common and general practice in that Sidney yard, and elsewhere, that all engines assigned to switching service should be equipped with headlights, foot-boards, and proper grab irons at both ends?

Mr. Strode: The defendant objects to that question as including

an element outside the Sidney yards, and incompetent, and not within the issues in this case.

Overruled. Exception.

A. Yes sir, a yard engine is supposed to have a headlight, at each end, and grab irons at the back and front of the engine.

Q. And foot boards also?

A. Yes sir.

Q. Is there or was there a foot board at each end of engine 213 on January 1st, 1911, while you were using it?

A. What do you call foot boards,—there was steps there to stand on.

Q. You may answer the question whether there was a foot board?

A. (No answer.)

Q. Do you know what a foot board means, in the requirements of equipping a switch engine?

A. A foot board is a board that I suppose you stand on.

Q. It runs clear across the engine?

A. Yes sir. Some of them don't and some of them do.

497 Q. Some of them are cut out in the center?

A. Yes sir.

Q. Now with that definition, was the engine two hundred and thirteen, that you were using at the time of the Huxoll accident, equipped with a foot board on each end. Right at the end of the engine?

A. Not a foot board, that ran across the engine, no sir.

Q. Did it have a foot board at either end?

A. Well it was about the same in front as it is behind.

Q. Well, you know what I mean by a foot board. It is a board that runs across at the end?

A. Well there was none on there.

Q. Did engine 213 have a head light at the rear that you could turn on when you backed into this steam and smoke.

A. No sir.

Q. Now you say the only switchman or flagman on that train was Riggs?

A. Yes sir.

Q. Was Borton acting as the switch engine foreman there, by virtue of his position there as yard master of these yards?

A. Well, he was yard master as I understand it. Riggs was the engine foreman, or the man who followed the engine.

Q. You spoke of Borton following it upon this occasion. Borton worked with the other two men in the switching operations that day?

A. Yes sir.

Q. Isn't it true that your crew would ordinarily consist of Borton and Riggs and Hower?

A. Yes sir.

Q. And isn't it true that one man would be called the switch engine foreman and the other two switchmen?

A. Well, Borton was supposed to be yard master, and I understand,—as I understand it Riggs the man that followed the engine.

Q. Did you ever hear him termed switch engine foreman in the yard operations?

498 A. Yes sir.

Q. Now what I am trying to get at was, that if in the ordinary yard operations, including those at Sidney, the crew didn't consist of, besides the engine crew, of a switch engine foreman, and two switchmen?

A. Now I always supposed that the yard master was called the yard master and the man who followed the engine was called the engine foreman.

Q. So you would say it was an engine foreman and a yard master and one switchman?

A. No, I mean the yard master and the engine foreman, and the two men besides.

Q. And Hower would be three?

A. Yes sir.

Q. And the only one of these three with the engine upon this trip was Riggs?

A. Yes sir.

Q. And he stood in the deck or upon the steps at the deck, between the engine and the tender?

A. Yes sir.

Q. So that then there was no man stationed at the leading end on a footboard there?

A. No sir.

Q. There was no flagman running ahead to keep you out of trouble, when you could not see the track?

A. No sir.

Q. Now you had started on a trip away out west that would take you clear across Rose Street?

A. I don't know.

Q. You would have no knowledge of that because you moved only upon a signal from a switchman or a switch engine foreman?

A. That is all, yes sir.

Q. And how would you get a signal if the conditions were such that you could not see the switchman who was to give you the

499 signal,—would you move your engine then, or not?

A. Why I wouldn't move no, until he gave me a signal to move and I could see the signal to move.

Q. And if you could not see he would have to come where he could tell his order orally?

A. I would have to see the signal before I would start.

Q. You sometimes take them orally I suppose?

A. No, they always work by signals.

Q. If you had operating conditions under which you could not see the track ahead, and could not see the switchman who gave the signals, then you would not move your engine, would you?

A. No sir, not if I could not see him.

Q. Under what circumstances would you operate in the yards there at Sidney, when you had no man stationed on the leading end whose signal you could take, and no flagman on the ground to give a signal or warning if you were running into something? And

where you could not see any portion of the track onto which you were running, ahead? Would you move at all under those circumstances, ordinarily?

A. Yes sir, I would move under precaution.

Q. Yow would you know under those circumstances, whether or not you were running into something?

A. Well, I would not know, but I would be moving cautious.

Q. You would just simply take your chance and stop when you heard something grind under the engine, or when you came against something?

A. If I thought there was something wrong, I would stop.

Q. Well, you would not know there was anything wrong under those conditions, until you ran into it? You would absolutely have no means of knowing when you were proceeding against something or not?

A. No sir.

Q. And still you say you would move under those circumstances?

A. I would move with caution.

Q. And you would run under those circumstances, if you knew you could not stop within forty feet, wouldn't you?

500 A. I would go through there slowly yes sir.

Q. Well, suppose you got a signal down to the east end of these yards, where you could see, and en route, when you were still obeying that signal, and without any new signal you ran into a piece of track, that was so obscured by steam, that you could not see a thing, would you want any help to see your way through or not under those circumstances, ordinarily?

A. Well, I would move through there slow.

Q. I asked you if you would want any help, if you could not see the track?

A. We never have had; we never have been flagged through there yet.

Q. You would not want any help, you would want to go through there and take your chances?

A. I would go through there cautiously.

Q. What does cautious mean under those circumstances?

A. I would go through there slowly.

Q. How would that be cautious, if you did not know what you were going into, and what was going into you?

A. In that case, these other trains—in the first place on the main line there—there is no trains supposed to be there, excepting the passenger train. The freight trains all head in before we get——

Q. Well, you don't know that, without protecting yourself by some signal, do you?

A. Well it is not a custom to have a freight train come down the main line at all.

Q. Do you say, that upon this very day, it wasn't your custom to go through these conditions, without any help to lead you through, and keep you out of trouble?

A. We were never flagged through there, that I know of.

Q. And isn't it true, that upon that very day, operating that very way, you collided with another engine in that same storm?

Mr. Strode: The defendant objects to that question as incompetent, and improper cross examination.

Overruled. Exception.

A. No sir, I was standing perfectly still when that engine struck me.

Mr. Strode: The defendant objects to that answer and
501 moves to strike it out as not responsive, incompetent, immaterial, and subsequent to this accident.

Mr. Rose: I will consent that that be stricken out.

Q. Isn't it a fact that upon the occasion of your deposition being taken to which we have referred, in June, 1912, Mr. Hoagland asked you this question, "How far do you think you went after the signal to stop, before you stopped?" and to that question, didn't you answer, "I do not think I went to exceed forty feet."

A. Yes sir.

The Court: The question, gentlemen of the jury as to whether or not the engineer had an accident other than the injury referred to upon that day, is eliminated, and you should not consider it at all as evidence in this case.

Q. How far was it west of the water crane,—was the point where you stopped, or the point where Huxoll was found trapped under the driving wheel?

A. I believe they measured it and it was 72 feet.

Q. I want to ask you if you drained the main reservoir or any of these reservoirs, before you took this engine this morning—213?

A. Yes sir.

Q. Where did you do that?

A. On the track there, right where we did that.

Q. Who did that?

A. I did that.

Q. And you found after that froze up?

A. Yes sir.

Q. And you used a torch did you, you made a torch of waste and engine oil, and used that to thaw it out?

A. Yes sir, we took some waste and put some oil on it, and used it.

Q. At eight o'clock or afterwards, that forenoon?

A. Yes sir, right around 8 o'Clock.

Q. And when you stopped, you did reverse the engine?

502 A. Yes sir.

Q. You reversed the engine as a part of the process of stopping?

A. I reversed it for that purpose, yes sir.

Q. Do you remember whether there were any curtains upon that engine, and what they were made of?

A. Yes sir, they were made of canvass.

Q. Were any of those curtains fastened down?
A. Two of them.
Q. Which two?
A. The side curtain on the north side, and the back curtain.
Q. Did Mr. Dupont climb onto the engine and give the signal to stop, or did you see him after the stop?
A. I saw him after the stop.
Q. He wasn't on the engine to give the signal for the stop, was he?
A. No sir.
Q. Didn't he holler for you to stop?
A. If he hollered for me to stop, the engine, I didn't hear him, when I saw him I was standing still.
Q. Did he tuck his head into the engine before or after you stopped?
A. Afterwards he stuck his head up under the curtain on the north side.
Q. This was after you stopped?
A. Yes sir.
Q. I will ask you if on the occasion of the taking of your deposition, to which I have referred, you weren't asked this question, "When did you first notice anything wrong or hear anything wrong?" and to that question, did you not answer as follows: "Riggs said, "Stop her" just like that, I do not think he gave me a signal. If he did it was with one hand. He was looking back, and he said stop her, and I turned back, and put the air on, and reversed the engine."
A. Yes sir, I put the air on and reversed the engine.
Q. The question was, did you answer the question in the way I have read here?
A. Well state it again, will you?
503 Q. I will ask you if on the occasion of the taking of your position to which I have referred, you weren't asked this question, "When did you first notice anything wrong, or heard anything wrong?" and to that question, did you not answer as follows: "Riggs said, 'stop her' just like that. I do not think he gave me a signal. If he did it was with one hand. He was looking back, and he said 'stop her' and I turned and put the air on, and reversed the engine"?
A. Yes sir.

Redirect examination.

By Mr. Strode:

Q. This deposition that your attention has been called to, Mr. Zimmer, did you ever see the deposition after it was written out?
A. No sir. When it was taken at Sidney.
Q. Yes sir?
A. No sir.
Q. It was taken down as the court reporter has taken your testimony here?

A. Yes sir.
Q. That is, it was taken down in shorthand, and extended afterwards?
A. Yes sir.
Q. By the reporter?
A. Yes sir.
Q. But you never saw it after it was extended afterwards by the reporter?
A. No sir.
Q. It never was submitted to you, or signed as a deposition?
A. No sir.
Q. It wasn't signed by you, was it?
A. No sir.
504 Q. And you never saw a copy that was written out?
A. No sir.
Q. Now have your observed other errors in this deposition than the one where the mistake was made in the answer that your attention has been called to?

Mr. Rose: The plaintiff objects to that question as calling for a general conclusion, incompetent at this time, and up to him to point out the specific errors if there is any.
Question withdrawn.

Q. Do you know whether or not there is any other mistakes in writing it out?
A. Yes sir, there is one more mistake there.
Q. Well, I noticed question fifteen, is written out, "How about the difference in the bank?" now was there any such question as that asked you?
A. No sir.
Q. That should have been tank and somebody has taken the liberty to write tank above there?
A. Yes sir.
Q. Now is there any other question that you recall, or recollect where there is a mistake?

Mr. Rose: The plaintiff objects to that question as immaterial.
The Court: I think he has a right to say whether there are or not.
Overruled. Exception.

Q. Well, you noticed there in answer to question eight, that they have had to make a correction by rubbing out the typewriting and putting in something else there?
A. Yes sir.
Q. Now calling your attention in this deposition to question twenty-three, "Where was the engine which you used that day, at the time you went to work?" now calling your attention to the answer, that is set out in this deposition I will ask you if there is any error in that answer?
505 Mr. Rose: The plaintiff objects to that question as immaterial irrelevant and incompetent, and not proper redirect examination.
Overruled. Exception.

A. (Reading.) I got her on what we call the spot track, right about west of the dispatcher's office, where it is now."

Q. Now that is the answer in the deposition?

A. Yes sir.

Q. Now what was the answer you gave to that question?

A. I said, I got it south of the yard master's office, that is where the dispatcher's office is now.

Q. And south, is what you explained here to the jury?

A. Yes sir.

Q. Now was there any place to get it west of that office?

A. No sir.

Q. So—was there any track or any place that could be possible to get it?

A. No sir.

Q. So that that was an error in copying this deposition?

Mr. Rose: The plaintiff objects to that question as calling for the conclusion of the witness.

Sustained. Exception.

Q. Now you were asked something about the window, whether you had your head out of the window, and whether it was cold. The storm was coming from which direction?

A. The north and west.

Q. And on which side of the engine would the storm strike?

A. The north side of the engine.

Q. Which side of the engine were you on?

A. The south side.

Q. Do you know whether the fireman—the window on the fireman's side of this engine was open or closed?

A. It was closed.

Q. That would be on the north side?

506 A. Yes sir.

Q. The fireman's side, on the north side, going the way you were going?

A. Yes sir.

Q. Now if the window had been closed upon your side, of that cab, could you have seen out in the direction in which you were going at all?

A. No sir.

Q. Would there have been any way you could have seen in the direction you were going?

A. No sir.

Q. It would have been like the closing of the door behind you here, you could not have seen on the other side?

A. No sir.

Q. And if that window was closed then you were in there in a closed place where you could not see at all in the direction in which you were going?

A. No sir, I could not see in the direction in which I was going.

Q. And then, the only way of seeing in the direction in which you were going, was through this window?

A. Yes sir.

Q. And that is true whether it is blowing or snowing, or storming, or not,—the storm would have nothing to do with the fact as to whether you could not see in the direction in which you were going, if you weren't looking out that window?

A. No sir, you could not see if you weren't looking out of the window.

Q. Now you were asked whether you saw the water crane,—were you on the side of the engine next to the water crane?

A. No sir.

Q. The water crane was over on the north side?

A. Yes sir.

Q. You were also asked on cross examination whether you drew off any water out of the main air drum, and I think you stated you did.

A. Yes sir.

507 Q. What appliance have they on this engine, and what is the process of drawing any water if there is any accumulated in the main air drum, what do they do?

A. There is a little valve underneath the drum that you open—a little valve.

Q. How do you open it?

A. There is a little handle that you raise up on it.

Q. Just turn it like you would turn a water faucet?

A. It is a two way cock, and you raise it up and turn it.

Q. Well, just like a water faucet?

A. Yes sir, on the same principle.

Q. And that you can do, just as quickly as you can turn a water faucet?

A. Yes sir.

Q. You don't carry tin buckets on the Union Pacific to hold water that is drawn out of the air reservoir?

Mr. Rose: The plaintiff objects to that question as not proper re-direct examination, immaterial.

Sustained. Exception.

Q. And that water and that reservoir, did that have anything to do or was that in any way related to that portion of the braking equipment that you have referred to, the pistons that apply immediately on the brake?

A. No sir.

Q. That wasn't on that portion of the engine, and had nothing to do with that?

A. No sir.

By Mr. Rose:

Q. You say it didn't have anything to do with that?

A. No sir, not with applying the brakes.

By Mr. Strode:

Q. And had nothing to do with the pistons you spoke about?

A. No sir.

Q. These pistons that are in the air chamber, that apply
508 the brake directly, are not anywheres near this point, to this air chamber?

A. No sir.

Q. What is the air chamber there for?

Mr. Rose: The plaintiff objects to that question as not proper re-direct examination.

Sustained. Exception.

Q. I think you referred on your direct examination to the curtain that was on the back of the cab, attached to the tender at the back end. I am not sure whether you showed where that curtain was fastened, from the cab, or the tender?

A. Well it is fastened right up there under the roof of the cab. (Indicating on exhibit.)

Q. And where is it attached to the tender?

A. It is right back over the coal, in the tender,—over the coal gates.

Q. To keep the coal from coming down into the cab?

A. Yes sir.

By Mr. Rose:

Q. Where is the supply of air pressure obtained to move the pistons that tighten the brakes?

A. That is carried in the train line, and in the air drum and the main reservoir.

(Witness excused.)

509 HERMAN SCHROEDER, called as a witness on behalf of the defendant, was first duly sworn and testified as follows upon examination by Mr. Scandrett:

Q. What is your name?

A. Herman Schroeder.

Q. What is your business.

A. Head car inspecter and wrecking foreman.

Q. Whereabouts?

A. Sidney Nebraska.

Q. How long have you occupied that position?

A. This particular position?

Q. Yes sir.

A. 11 years, about.

Q. How long have you been in the service of the company?

A. 24 years.

Q. What other departments do you work in, or did you work in prior to the time you took the present position?

A. In the car department.

Q. Were you in Sidney, on January 1, 1911?

A. Yes sir.

Q. Just tell the jury generally what your duties are?

A. Well, I have car inspectors, a gang night, and one gang days,

and the car repariers work under me. They inspect all trains and repair all bad order cars,—that is crippled cars, and I have the supervision over the men.

Q. Do you, ever under any circumstances, have occasion to inspect engines?

A. Well I do when there is a personal injury connected with it.

Q. And under such circumstances do you make a report of what you find?

A. Yes sir.

Q. When did you first hear of the Huxoll accident?

510 A. Well, I guess it was shortly after it hap-ened. I didn't hear of it.—I happened to see the engine after it happened,—I happened to see the engine standing on the spot that it was. I saw Mr. Orton, I did not know at the time he was Mr. Orton, but I saw the men running over from,—over to this engine, and I ran down to see what the trouble was.

Q. And you were there, and assisted in taking Mr. Huxoll out, did you?

A. I was.

Q. And did you make an inspection of that engine before it was moved from that place on that day?

A. Yes sir.

Q. What was the result of that inspection. What did you find the condition of the engine to be?

Mr. Rose: The plaintiff objects to that question as the witness is not qualified as an engineer, and no perliminary evidence showing that his judgment as to what the condition of the engine was, is of any value whatever.

Sustained. Exception.

Q. What work had you had around engines, prior to this time, Mr. Schroeder?

A. Well, I have inspected engines for safety appliances, brakes and couplers, and so forth.

Q. In that work did you become familiar generally with the working of the air appliances and the brakes upon engines?

A. Yes sir.

Q. The brakes themselves,—then tell the jury whether or not they work upon the same principle as the air brakes upon cars?

A. Identically the same.

Q. And during your whole work you have had occasion to frequently inspect and work around engines in that way?

A. Only in case of injury have I inspected engines.

511 Q. For how long a period have you been inspecting engines under those conditions?

A. For the last 11 years.

Q. Does your work in and around, and in connection with the cars take you more or less around the round house?

A. Yes sir, a good deal.

Q. Have you ever worked in the shops?

A. In the train shops?

Q. Yes sir?

A. No sir.
Q. You have never done any work in connection with the construction of engines?
A. Yes sir.
Q. And you are familiar with the working of the brakes and air appliances on engines?
A. Yes sir.
Q. And you were at that time.
A. Yes sir.
Q. Tell the jury what condition you found the brakes on this engine in at the time you inspected it, on January 1st, after this accident?

Mr. Rose: The plaintiff objects to that question as no foundation laid, and the witness has not shown himself qualified.
Overruled. Exception.

A. In first class condition.
Q. What sort of an inspection did you make, how thorough was it Mr. Schroeder?

Mr. Hoagland: The plaintiff moves to strike out the answer of the witness to the last question, as a conclusion of the witness, incompetent, not a statement of any fact.
Overruled. Exception.

Q. What sort of an inspection did you make, how th-rough was it?
A. Well, I inspected the engine for defective couplers and brakes and grab irons and in fact everything pertaining to safety appliances.
512 Q. Did you find anything wrong with any of those appliances or not?
A. No sir.
Q. Tell the jury whether or not any of the brake rigging was disconnected on that engine at the time you made that inspection?
A. Why yes sir, the driver brake was disconnected.
Q. Was that disconnected while you were there?
A. Yes sir.
Q. Did you have anything to do with the disconnecting of that brake rigging?
A. I did not.
Q. Did you see them when they disconnected it?
A. Yes sir.
Q. Who did it?
A. Mr. Clark.
Q. Just tell the jury what steps were taken by Mr. Clark and others in order to disconnect this brake rigging, on that occasion?
A. Do you mean,——
Q. That is, what they had to do,—how did they disconnect the brake rigging?
A. Well they had to take a couple of lever pins out of the brake lever in order to disconnect it.
Q. Tell the jury whether or not in order to disconnect that brake

lever it was necessary for them to work the air on the engine in any way?

A. They had to release the air, before they could disconnect it.

Q. Was the air set when they first began to work to remove Huxoll?

A. It was.

Q. The brakes were set?

A. Yes sir.

Q. How did they release the air, do you know?

A. The engineer in the cab.

Q. Did you see them release it?

513 A. Well, you didn't have to see it, you knew it was released after he released it.

Q. I mean, were you right there when he did release it.

A. I told him to release it.

Q. You told him to release it?

A. Yes sir.

Q. And tell the jury whether or not, it would be possible to disconnect the brake rigging without releasing the air?

A. It would be an impossibility.

Q. Why would it be?

A. Because the levers and brake rods would be,—there would be such a tension on it while the brake was set that ot would be impossible to disconnect them unless you took a cold chisel or a sledge hammer and broke either the rod or the pin.

Q. Did you go *puthere* into the cab of the engine at all in your inspection?

A. No sir.

Q. So you do not know whether or not the bell rope,—or anything about the consitions inside of the cab.

A. No sir.

Q. Will you tell the jury why they removed this brake rigging?

A. They removed it to get Mr. Huxoll out.

Q. Why was it that the removal of the brake rigging was necessary to get him out?

A. He was directly under the brake rigging.

Q. And they had to take the brake rigging off entirely to get him loose?

A. To disconnect the brake rod, yes sir.

Cross-examination.

By Mr. Rose:

Q. Are you still working for the Union Pacific Railroad?

A. I do.

514 Q. When you were making your inspection, did you have an inspection sheet with you to indicate the parts that you inspected *and*, and to report on?

A. Yes sir.

Q. Have you got that with you?

A. I think it is here.

Q. You look after engines only where there is a casualty involving the engine, do you?
A. Yes sir.
Q. And outside of that, you have no business with an engine?
A. No sir.
Q. And you have examined a good many engines under those conditions have you?
A. I presume I have.
Q. And you regard it that you had had occasion on that narrow line of inspection to inspect a good many engines in the Sidney yards, while you have been there?
A. I have been there 24 years.
Q. Well, I said in the 11 years you have been in the job of inspecting. You have had a good many engines to inspect in that time have you?
A. No- so many.
Q. Not very many?
A. (No answer.)
Q. How many engines do you think you have inspected?
A. I could not tell unless I got my work records.

Redirect examination.

By Mr. Scanderett:

Q. I hand you paper marked Exhibit 11, and I will ask you whether that is the report that you made out covering your inspection on this engine?
515 A. Yes sir.
Q. That report is signed by you sir, is it?
A. Yes sir.
Q. When was it made out with reference to the time that you inspected the engine?
A. Shortly after the accident.
Q. And that report shows the result of your inspection, does it?
A. It does.
Q. It is one of your duties isn't it to make a report of this kind?
A. In all cases of accident.
Q. And to whom did you sent this report after you made it out?
A. I turned it into the general foreman's office.
Q. On the same day?
A. Yes sir.

Mr. Scandrett: The defendant offers in evidence Exhibit Number 11.

Mr. Rose: The plaintiff objects to that offer as a mere hearsay and a self serving declaration, and made deliberately, long after the happening of the accident, and not a part of the res gestæ, or otherwise competent as primary evidence.

The Court: I think that in view of the fact that this was brought out in cross examination, as to the existence of this report, I will overrule the objection. Exception.

Q. Is this the only inspection sheet you had, and used in making that inspection, or an inspection of that kind?

A. That is all.

Q. This is the only place where you made a record of this inspection?

A. Yes sir.

Q. And it was your duty to make a record of this inspection?

A. Yes sir.

Q. And this is the only record you made of it?

516 A. Yes sir.

By Mr. Rose:

Q. Do you mean to say that you went to the place of this casualty, running there because you saw Orton around there and took a blank form of a casualty report with you and looked over the accident and the engine and made out that report on the ground, out doors, when it was fifteen degrees below zero?

A. I do not believe I said that.

Q. Well I asked you if you had an inspection sheet present at the time you made the inspection?

A. I had my memorandum book to put it into, and then copy it off onto this sheet.

Q. So this is not the sheet you had present at the time you made the inspection?

A. This is the original sheet that was made, yes sir.

Q. So this is not the sheet present at the time you made the inspection?

A. It was copied from my memorandum book.

Q. When did you make up the memorandum book?

A. Right after the accident.

Q. You took your memorandum book out of your vest pocket and made a memorandum in it.

A. Out of my hip pocket.

Q. Out of your hip pocket?

A. Yes sir.

Q. And this is the inspection made, to which you refer?

A. Yes sir.

Q. And then later you made out a casualty report deliberately somewhere else?

A. I made this report from the memoranda of my memoranda book.

Q. Well, you didn't make this report at the time you inspected it out there?

A. No.

517 Mr. Rose: We still insist on the objection to the offer of Exhibit 11.

The Court: On the statement made by counsel for plaintiff that the question he put to the *qui*tness was merely one of asking him whether or not at the time of the inspection made as testified, he had in his possession then and there a blank sheet, used for making a

report as inspector, and the court believing that the attorney examining witness referred to the report itself, but being informed by counsel that his question was otherwise, and the court further examining the sheet purporting to be such report so made, and the sheet not bearing any date, or disclosing the date as to when the said report was made, objection sustained. Exception.

Exhibit 11, rejected, but the same or a copy of the same is hereto attached.

By Mr. Scandrett:

Q. You know however, Mr. Schroeder, that the brakes were in good condition at that time?

Mr. Rose: The plaintiff objects to that question as not proper redirect examination.

Sustained. Exception.

Mr. Scandrett: That is all.

Mr. Rose: That is all.

Witness excused.

518 JAMES C. CLARK, called as a witness on behalf of the defendant, being first duly sworn testified as follows upon examination.

By Mr. Miles:

Q. What is your name?
A. James C. Clark.
Q. Where do you live?
A. Sidney, Nebraska.
Q. How old are you.
A. 33 years old.
Q. Where were you living on January 1, 1911, and by whom were you employed on that date?
A. Living at Sidney, Nebraska, and I was employed by the Union Pacific Railway Company.
Q. What was the nature of your employment there?
A. I was engine inspector.
Q. Explain what you did as such inspector?
A. Well I examined all incoming engines for defects.
Q. Were you employed by the *Unpacific* Railway on January 1, 1911, at Sidney as engine inspector?
A. Yes sir.
Q. How long before January 1, 1911, did you work for the Union Pacific Railway Company, the defendant here?
A. You mean the total length of time?
Q. How long prior to January 1, 1911?
A. Oh, about three years I guess, two and a half or three years.
Q. Were you familiar with the yards of the Union Pacific at Sidney at that time?
A. Yes sir.
Q. And did you know the location of the wash house the round

house, the spot tracks,—meaning the east out going spot track, and the west out going spot track, as to their location?

A. Yes sir.

Q. Where were you in the Union Pacific yards at the time of the accident in which Engineer Huxoll received the injuries that
519 resulted in his death?

A. Right at the water crane, on the tank of engine 1913.

Q. What were you doing with engine 1913?

A. I was filling the tank with water.

Q. How many engines were on the spot track, for out going trains east, at that time?

A. Two.

Q. What were they?

A. Engine 1913 and engine 1909.

Q. Did you observe switch engine 213 or engine 213 when it passed by you at the water crane, on the main line at that time?

A. Yes sir.

Q. Was the bell of the engine 213 ringing as it passed you?

A. Yes sir.

Q. Did you hear the bell?

A. Yes sir.

Q. At about what speed did engine 213 pass you at the water crane?

A. Somewheres between three and four miles an hour.

Q. When after the engine passed you did you learn of the accident?

A. Well, after I had filled,—after I had completed filling the tank of engine 1913.

Q. Well, about how long?

A. 5 or 6 minutes.

Q. Did you inspect engine 213 on that day, and if so when?

A. I inspected engine 213 in the afternoon after the accident.

Q. Well when?

A. Somewheres between one and two thirty, I guess it must be somewheres around there in the afternoon.

Q. What condition did you find the engine in?

Mr. Rose: The plaintiff objects to that question as too remote, and no proof that the engine had not been tinkered with in the mean time.

Sustained. Exception.

520 Q. How much experience did you have Mr. Clark in inspecting engines?

A. About 18 months all told.

Q. And what is your occupation now, or has it been since you left the employ of the Union Pacific?

A. I was employed for two years as stationary engineer for the Sidney Electric Service Company and I am now at present employed as engineer for the Sidney Ice & Cold Storage Company.

Q. Now explain why you say between one and two thirty, why you don't fix it more definitely?

A. Well I had other duties to perform outside of the inspecting of the engines.

Q. Do you know where the engine was in the mean time?

A. Right after dinner.

Q. Yes sir?

A. Yes, sir, it was along over,——

Q. Well, between the time Mr. Huxoll was extricated from beneath the engine and the time you say you inspected it, where was the engine in the mean time?

A. They ran it onto the west spot track if I remember rightly and put it from there into the house.

Q. How long did it remain on the west spot track?

A. I don't remember.

Q. Do you know when it was taken into the house?

A. Just about noon.

Q. Did you go to your dinner that day?

A. Yes sir.

Q. Was there anybody else inspecting engines but you?

A. No sir.

Q. And you found the engine in the round house when you came back?

A. Yes sir.

Q. There was nobody there working on the engine in
521 the mean time was there?

A. No sir.

Q. Or doing anything whatever with it?

A. Nobody around the engine when I approached it.

Q. Did you, while over at the engine, after the accident, did you aid in extricating Mr. Huxoll?

A. Yes sir.

Q. What did you do there?

A. Well, I went after some jacks to help jack up the engine.

Q. Was there any part of the appliance detached in order to admit of Mr. Huxoll being taken out?

A. Yes sir, the brake rigging had to be uncoupled.

Q. Was that done right there?

A. Yes sir, right where he was under the engine.

Q. What was done with the braking appliance?

A. Well they had to take the brake shoes off and loosen up the levers,——

Q. What was afterwards down- with them?

A. Some of the brake rigging was placed on the front end of the engine.

Q. Did you find that -n the front end of the engine just as you left it at that time?

A. Yes sir.

Mr. Miles: Now I would ask of course to renew the question, "What condition did you find the engine in?"

Mr. Rose: The plaintiff objects to that question as no founda-

tion laid, and a period too remote, and no showing that the engine had not been meanwhile changed.

(Question withdrawn.)

Q. Now what part of the engine or appliance did you find to be particularly in the way when you were there helping to extricate Huxoll?

A. The brake rigging.

522 Q. What did you do with the brake rigging.

A. We uncoupled it.

Q. Were you there, and saw all that was done with it?

A. No, not all of it,—I was there most of the time, or part of the time.

Q. Well, what was the condition of the brake rigging, when you first came up there?

A. Everything was coupled up, and the brake rigging was intact.

Q. And in good order?

A. Yes sir.

Q. Was the bell ringing apparatus on the engine in good shape?

A. While the engine was standing there where Huxoll was taken out?

Q. Yes sir?

A. It must have been, I heard the bell ringing just before that.

Mr. Rose: The plaintiff moves to strike out the answer as not responsive.

Sustained. Exception.

Q. Do you know the usual route taken by engine men in going to their engines, down on the east out going spot track?

A. Yes sir.

Q. How did they walk to their engines,—what pathway did they pursue, or how did they go to their engines,—describe that here on the map?

Mr. Rose: The plaintiff objects to that question as wholly immaterial and irrelevant in view of the special conditions that are already reflected by the testimony in this case.

Overruled. Exception.

A. (No answer.)

Q. Here is the wash house, now you descri-e the route taken by the engine men in going to their engines on the east spot track?

A. They generally started from the wash house and go over here,
and cross this west spot track going between the turn table
523 pit and the north rail of the main line, and sometimes they cross over when they get near the stand pipe and go around on this side of the engine, but generally they take this course down here between the south side of the turn table pit and the north rail of the main line, right down to the engine, direct.

Q. Now is the path that you have just now pointed out, the usual path taken by enginemen as you know it?

Mr. Rose: The plaintiff objects to the question as leading and suggestive and a mere repetition.

Sustained. Exception.

Q. Were there any tracks necessary for an engine traveling that route to cross between the wash house and the spot track?

A. Yes sir.

Q. And if so point them out to the jury there?

A. This west spot track was the only one necessary to get to their engines.

Q. Was there plenty of room in that Sherman gravel and cinder path for men to walk in?

A. Yes sir.

Q. State as near as you can about the general width of it, taking the south line of the turn table to the north line of the main track?

A. Well, it varies from about 60 feet to about 12 feet, I guess, something like that.

Q. Does it get narrowed as it appr-aches the spot track?

A. Yes sir, the east spot track.

Q. Do you know the way the tracks are located that lead into the round house at that time?

A. Yes sir.

Q. I mean from the turn table?

A. Yes sir.

Q. Was your employment taking into consideration the time that you have been employed by the Union Pacific generally about the yards at Sidney?

524 A. Yes sir.

Q. Whereabouts in the yards?

A. About the round house.

Q. Do you know of any custom or did you know of any custom existing at that time, to have a flagman on the leading end of the switch engine, or an engine used in the yard for switching purposes, for the purpose of flagging?

A. No sir.

Q. Was there any such custom?

A. I knew of none.

Q. Was the inspection of engine 213 done by you in the regular line of your duties?

A. Yes sir.

Q. What condition did you find the engine in at the time of the examination?

A. I found everything all O. K. with the engine excepting the brake rigging which was uncoupled.

Q. In what condition did you find the engine at the time of this inspection as to the bell ringing apparatus and the bell cord?

A. Everything was all right.

Q. When you answer all right, except the brake rigging, with reference to the question propounded before the last one, state what you mean by saying "excepting the brake rigging."

A. It was uncoupled. We had to uncouple the brake rigging out in the yards to get Huxoll from under the engine.

Q. Did you afterwards put it together?

A. No sir.

Q. Were the air brakes tested at the time you made this inspection?

A. Yes sir.

Q. By whom?

A. By me.

Q. Describe to the jury how that was done?

525 A. Well I inspected the air brakes and the man up in the cab he applied the air to the automatic valve, and I got under the engine to see that the piston rods worked free, and they all applied. And this was done before the brake rig-ing was coupled up.

Q. Where were you at the time of the application?

A. I was under the engine in the pit.

Q. And what did you discover there from that test?

A. I found everything worked all right.

Q. You may now tell about what time was occupied by you in making this inspection?

A. From 30 to 45 minutes.

Q. You may now state to the jury in a general way what your duties were in connection with the examination of engines and how you did it, and the character of the engines?

A. Well we had to crawl under the engine in the first place and examine all the eccentrics and the links and all the mechanism under the engine for any defects, for loose bolts and nuts, or anything of the kind. If we found anything there that was loose or broken, it was reported to the general foreman, and it was fixed.

Q. When was this done with relation to the arrival of engines at the round house.

A. It was generally on the arrival of the engines in the round house, just as quick as I could get at them.

Q. Did the same rule apply to all engines?

A. Yes sir.

Q. Do you know about the length of the east out going spot track, —that is about how many engines could be placed there?

A. I believe about eight or ten engines, if I remember right.

Q. Now did the engines placed on that east out going spot track, stand west of the water crane, were there s-me engines placed there west of the water crane?

A. Yes sir, it would hold anyway about three or four engines west of the water crane.

Q. Now Mr. Clark, I will ask you if you made any report

526 and if so to whom did you m-ke it?

A. I do not believe I made any report on this particular engine because everybody knew about that accident, but I generally made my reports either to the general foreman or the round house foreman.

Q. I mean in this particular instance do you remember having made a report to the round house foreman?
A. No, I do not.

Cross-examination.

By Mr. Rose:

Q. What is your business at this time?
A. Engineer for the Sidney Ice and Cold Storage Company, at Sidney, Nebraska.
Q. Have you ever taken a course of training in mechanical engineering?
A. A partial course.
Q. Where?
A. At the American School of Correspondence.
Q. That is all, is it.
A. Yes sir.
Q. Do you mean to give the impression that there was a beaten path between the turn table and the main line track open on Ja-uary 1, 1911, over which the engineers proceeded regularly to the spot track from the wash house?
A. What I mean by beaten path is there was a good solid path between the north rail and the turn table pit, any place along there.
Q. How many snow drifts were in the way on January 1, 1911?
A. I don't know.
Q. Was there a track marked that day,—did you look between there to see whether engineers going to and fro had left a path in the snow that day?
527 A. There wasn't but very little snow there.
Q. (Last question read as follows:) Was there a track marked that day,—did you look between there to see whether engineers going to and fro had left a path in the snow that day?
A. No, I didn't look.
Q. There is no special path made there is there any different from any other place in the yard?
A. No sir.
Q. There is nothing there to distinguish the particular class of ground or path there from what there is all over the yards, is there?
A. No sir.
Q. Now as a matter of fact you have seen engineers and fireman come from that wash house and take different routes?
A. Yes sir.
Q. And you have seen them go down the main line?
A. I don't believe I ever seen a man go down the main line.
Q. You have seen them go across the tracks between the turn table and the round house, and go across the turn table?
A. Yes sir, and then around the north side to-, quite frequently.
Q. Did you ever see any bulletin containing any direction as to what course the engineers and firemen should take when they left the wash house to go to the spot track?
A. No sir.
Q. You don't know of any such bulletin?

A. No sir.
Q. You don't know of any regulation on the subject?
A. No sir.
Q. Now you didn't make an inspection of this engine with reference to the Huxoll accident at all did you?
A. No sir, not with reference to the accident.
Q. When that engine came in out of the yard it had not been housed?
528 A. When it came in out of the yards?
Q. I mean when it came off the road from Cheyenne on the previous night, it had not been taken into the house at all.
A. No sir.
Q. Although it came in sometime during the night before, it had gone on there working without your ever having inspected it, as a matter of fact?
A. Yes sir.
Q. So that that was the first opportunity you had had to inspect the engine after it came into the yards from a run on the main line?
A. Yes sir, that is after the accident, when it was placed in the house, was the first opportunity I had had.
Q. And it may have been as late as two thirty in the afternoon?
A. Yes sir.
Q. And you made no casualty report with reference to this particular casu-lty?
A. No sir.
Q. And you are testifying now from memory?
A. Yes sir.
Q. As a matter of fact you kept no record at all of your inspection and didn't file any record with the yard foreman or the master mechanic?
A. No sir, I had not such instructions.
Q. Well, did you work under the master mechanic?
A. I did.
Q. How many engines did you inspect that week?
A. I could not say how many exactly.
Q. As many as a hundred or even more than 100 that week?
A. Possibly, maybe more.
Q. And you think that without any memorandum you could detail what tests you made on each engine?
A. Yes sir.
529 Q. Now you say that it was about five or six minutes you think, after engine 213 passed you, before you arrived at the spot where Mr. Huxoll was held down under the engine?
A. Yes sir, approximately.
Q. In going over that course there, you would have to go over the identical course you say the engine had run, after it struck him, wouldn't you?
A. Yes sir.
Q. Do you recall finding some mark on the rail, and seeing Mr. Huxoll's hat, on that way?
A. No sir, I don't.
Q. Did you find red marks or blood stains along the snow there?

A. No sir.
Q. Did you look for anything of that kind?
A. No sir, I did not.
Q. Was there any stains where he lay under the engine, or anything of that kind?
A. The only blood stains I seen was on Mr. Huxoll's clothes, when he was under the engine.
Q. Who was with you on the engine tank of 1913?
A. I was by myself.
Q. Who else was on the engine?
A. Mr. Nicholson.
Q. Anybody else?
A. No sir.
Q. Where was Orton?
A. I don't know where Orton was.
Q. Did he have that identical engine?
A. That was the Orton engine, 1913.
Q. Had Orton at that time, reported for duty?
A. No sir, not at that time.
Q. Didn't you go from your engine with Orton to the place where this accident had happened?
A. No sir, when I arrived at engine 213, he was under the engine.
530 Q. Well, hadn't he left engine 1913 to go there?
A. I suppose so, but I didn't see him there at all. His fireman was there, and Mr. Dupont in the cab of 1913, when I completed filling the tank.
Q. And you say Dupont was in the cab of what engine?
A. 1913.
Q. Didn't Dupont accompany Huxoll from the wash house, and wasn't he Huxoll's fireman, assigned for this special order?
A. He was Huxoll's fireman, but I do not know whether or not he accompanied him from the wash house, he said he did.
Q. Well, don't you recall that he was accompanying Huxoll and that he pretty nearly lost his own life, and had his satchel knocked out of his hand?
A. That is what he told me.
Q. Well, was he at the cab at 1913, before or after the accident, go ahead and explain it, if he went there to report the casualty to Huxoll or anybody?
A. I got down from filling the tank, and after I got down, Mr. Orton says, "My God, there is a man out under that engine there, 213, and I jumped down there, and Mr. Orton was already under the engine, and was holding up Mr. Huxoll's head.

By Mr. Miles:

Q. What is the general appearance of the ground there, with reference to the kind of ballast or gravel that there was on this hard surface down to the spot tracks from the wash house?
A. It is all nice and level and a good hard beaten path, you might say all over the whole yards there.

Q. Now Mr. Rose asked you if there was anything to distinguish this hard gravel surface which led down to the east out going spot track from the rest of the ground. Now I will ask you how many tracks are there along that way?

A. Going from the wash house down?

Q. Yes sir.

Mr. Rose: The plaintiff objects to that question as already answered.

531 Sustained. Exception.

Witness excused.

ROSCOE ZIMMER, recalled by the defendant, testified as follows upon examination.

By Mr. Strode:

Q. Mr. Zimmer, in Mr. Matthew's testimony, he testifies something about brake rigging being taken off of the tank, I think. Or off of the engine, that morning before this accident. Now I want to call attention to that testimony on the part of Matthews, and ask you to state the fact as to whether or not any brake rigging was taken off from that engine at any time by you or Mr. Matthews or anyone prior to the time of this accident?

A. No sir.

Q. If any part or portion of that brake rigging, or rods had been taken off prior to the accident, would it have disabled it or disabled the braking appliance so that it could not have been used?

A. If the connecting rods had been taken off, it would, yes sir.

Q. Now what is your duty in turning in an engine, after you are through with your work, for the day in the matter of reporting any repairs to be made?

Mr. Rose: The plaintiff objects to that question as immaterial, as to reporting it.

Overruled. Exception.

A. We d-n't turn an engine in when we leave it.

Q. Do you give a work order when you turn in an engine where repairs are necessary?

A. Yes sir.

Q. So that at the end of the day, when you turn in an engine if any work is to be done on that engine you give a work order?

532 A. Yes sir.

Q. And is that in writing, usually?

A. Yes sir.

Q. And who gets that order?

Mr. Rose: The plaintiff objects to that question as immaterial.

Overruled. Exception.

A. Mr. Nicholson.

Q. Now on this matter, when you turned this engine over, after the accident, who did you turn it over to?

A. I took it around and left it on the ash pit?

Q. That is over here, shown on this map, as the cinder pit, isn't it?
A. Yes sir, that is the place.
Q. Is that where all the engines are taken before they are taken into the round house?
A. Yes sir, they are taken on there, and the fire taken out of them.
Q. And now there is where you took that engine?
A. Yes sir.
Q. From the point of the accident over there?
A. Yes sir.
Q. Now what report if any did you make to Mr. Nicholson, as to the work to be done on this engine?

Mr. Rose: The plaintiff objects to that question as he-resay, and a self serving declaration after the accident.
The Court: Unless you produce the authority for this Mr. Strode, the objection will be sustained. Let it go until the next morning.

5 o'clock P. M. October 20th, 1913, court adjourned until 9:30 A. M. the following morning, October 21st, 1913.

533 9:30 A. M., October 21st, 1913. Court met pursuant to adjournment and the following proceedings were had and done.

Mr. Strode: I would like to call Mr. Stewart now, as he is another witness, whom I can introduce upon this same subject.
Leave granted.

FRANK W. STEWART, called as a witness on behalf of the defendant, was first duly sworn and testified as follows upon examination,

By Mr. Strode:

Q. Where do you live?
A. Cheyenne.
Q. Were you in the service of the Union Pacific on the first of January, 1911?
A. Yes sir.
Q. How long had you been in the service of the Union Pacific prior to that time?
A. About 19 years.
Q. Are you still in the service of the Union Pacific?
A. Yes sir.
Q. And have been continuously since January 1st, 1911?
A. Yes sir.
Q. In what capacity were you employed?
A. Locomotive engineer?
Q. Locomotive engineer?
A. Yes sir.
Q. During all this time you have referred to?
A. No sir.
Q. Well what portion of the time were you employed as locomo-

tive engineer for the Union Pacific, and what portion of the
534 time did you serve the company, in any other capacity?
A. About six years of that I was firing.
Q. The first six years of your 19?
A. Yes sir.
Q. What run, or what kind of an engine, or upon what trains did you operate your engine?
A. In the freight service.
Q. Between what points?
A. Between Cheyenne and Sidney.
Q. And were you operating a freight engine or locomotive between Cheyenne and Sidney on January 1st, 1911, and prior to that and subsequent to that date?
A. Yes sir.
Q. And the engine 213, Mr. Stewart, has been referred to in this case, the engine that was involved in the accident to Mr. Huxoll in the yards there, state whether you operated that engine on the date of December 31st, 1910?
A. I did, yes sir.
Q. Had you operated that engine prior to that time?
A. Yes sir.
Q. And where did you,—did you bring that engine in from Cheyenne?
A. Yes sir.
Q. When did you leave Cheyenne,—with that train?
A. I think it was between 9:30 and 10 o'clock we left Cheyenne.
Q. On what date?
A. December 30th.
Q. 1910?
A. Yes sir.
Q. That is, it takes you a day to get into Sidney from Cheyenne?
A. Yes sir.
Q. What kind of a train did you have?
A. A freight train.
Q. How long a train?
535 A. I could not say as to that, I do not remember how many cars we did have.
Q. Do you recall anything about the train, whether or not it was an ordinary train?
A. Between 50 and 60 cars.
Q. Did you bring that train of freight cars in from Cheyenne with that engine?
A. Yes sir.
Q. Who was your fireman?
A. John Stanley.
Q. Where is he now?
A. I could not say.
Q. Where did you last see John Stanley?
A. It has been about a year ago.
Q. Where was he then?
A. He was in Cheyenne.

Q. In the service of the Company?
A. No sir.
Q. In whose service was he at that time?
A. In the employment of the government.
Q. The U. S. Government?
A. Yes sir.
Q. In connection with the post there at Cheyenne?
A. Yes sir.
Q. Do you know whether or not he is there now, or not?
A. I could not say whether or not he is there now, I do not think he is though.
Q. You have not seen him?
A. No sir.
Q. What time did you get into Sidney with your train on the morning of January 1, 1911?
A. 5:40.
Q. In the morning?
A. Yes sir.
536 Q. And where did you leave your cars on this train, and where did you leave your engine?
A. I left the train in what is known as the west yard.
Q. That is, yuou left the cars that were in your train there?
A. Yes sir.
Q. Now the west yard is west of the station, is that right?
A. Yes sir.
Q. West of Rose street?
A. Yes sir.
Q. And what did you do with your engine?
A. I turned it over to the switchman.
Q. At what point in the yards, or where?
A. Just south of the hotel there.
Q. That is in this neighborhood there,—shown on this map?
A. Yes sir.
Q. There is the hotel, and here is the wash house, and here is the office, (Indicating).
A. Yes sir.
Q. Right in here?
A. Yes sir.
Q. South of the hotel,—and it is a little east of the hotel or do you think it was directly south?
A. It was about directly south.
Q. On the main track or on track number one?
A. On track number one.
A. And it was 5:40 in the morning?
A. Yes sir.
Q. Who was the switching crew you turned the engine over to at that time?
A. It was the yard master that turned the engine over to me, he came around to me, and told me that they wanted to use the engine.
Q. You were on the way to take it into the round house?
A. Yes sir.

537 Q. And then did he stay there and take care of the engine, or did you?

A. I looked the engine over and left it there.

Q. You looked it over and left it there with him?

A. Yes sir.

Q. What did you look it over for?

A. I looked it over to see what work there was to be done on it,—or reported on.

Q. When you bring the engine in there, state what is your first duty when you get in with your engine?

A. To look the engine over and see what work is necessary to be done.

Q. Is that one of the requirements for the operation of the road?

A. Yes sir.

Q. When you examine your engine to see if there is any repairs to be made, then what did you do?

A. What did I do?

Q. Yes sir?

A. Report it.

Q. And how do you report it?

A. Put it on a blank for that putpose.

Q. And to whom is that report delivered?

A. To the foreman at Sidney.

Q. The foreman of the round house there?

A. Yes sir.

Q. And for what purpose?

A. To have that work done.

Q. So that the engine will be in proper condition to go on with its work?

A. Yes sir.

Q. Now that is always done by the engineers beinging their engines in?

538 A. Yes sir.

Q. Now did you make out a report that morning as to the repairs that were necessary to be made on this engine?

A. Yes sir.

Q. And did that report show all of the repairs that were necessary to be made?

A. Yes sir.

Q. I will hand you Exhibit 12, Mr. Stewart, and ask you to examine this exhibit and state what it is?

A. That is my report.

Q. Is that report in your handwriting?

A. Yes sir.

Q. Signed by you?

A. Yes sir.

Q. And the writing in the body of the report in whose hand writing is that?

A. That is my hand writing.

Q. Now you may state whether that report was made by you to

the foreman of the round house, upon your coming in with your engine that morning at about 5:40 in the morning?

A. It was.

Q. You may state whether that is a correct report of the repairs that were necessary to be made upon that engine at that time?

A. Yes sir.

Mr. Strode: Now we offer in evidence, Exhibit number twelve.

Mr. Rose: I would like to ask the witness a question or two in regard to this exhibit.

Mr. Strode: Certainly.

By Mr. Rose:

Q. When did you deliver this to the round house foreman?

A. Well it was probably delivered there thirty minutes after I arrived.

Q. Could you verify the fact that you delivered it that
539 morning at about six o'clock,—did you go to the round house in person?

A. I went to the wash room, where they make out those reports and made it out.

Q. You made it out in the wash room?

A. Yes sir.

Q. And then did you carry it with you, or what did you do with it?

A. No sir, I left it there for them to take them off.

Q. Is there a peg there in the wash room?

A. Yes sir.

Q. And that room is furnished for the engineers and the firemen?

A. Yes sir.

Q. And it is where you change your clothes?

A. Yes sir.

Q. But you didn't house the engine that morning?

A. No sir, I never do.

Q. Then it would not have been you that would have taken the engine in?

A. No sir.

Q. You would have left it on the track, in any event for some hostler?

A. Yes sir.

Q. Which window was the engineer's window in the cab?

A. The right.

Q. Did you say this was actually made out and delivered before this casualty happened?

A. That was made out.

Q. And put on the peg?

A. Yes sir.

Q. In the morning?

A. Yes sir.

Q. And you have never seen it or changed it since?

A. Yes sir.

Mr. Rose: I do not know as to the admissibility of Exhibit 12, but I do not think we have any objections to make to it.

540 Exhibit 12 received in evidence and read to the court and jury and a copy of the same, or the original is hereto attached and made a part of this record.

By Mr. Strode:

Q. Now under the heading here in this report, it says, "Work needed" doesn't it?

A. Yes sir.

Q. Now immediately under that is some writing?

A. Yes sir.

Q. Now you may tell the jury what work if any was needed on that engine when you came in with it that morning at five forty?

Mr. Rose. The plaintiff objects to that question as the document itself is the best evidence as to that.

Sustained. Exception.

Q. Then you read it yourself.

A. (Witness reads that portion of the document.)

Q. What are the *guage* cocks on the engine?

A. A cock provided there to *guage* water by.

Q. Is the *guage* cock to measure the water?

A. Yes sir.

Q. What else?

A. Calk leaks to fire box.

Q. That is to block up the leaks with some kind of a preparation of some kind?

A. Yes sir, with a chisel and hammer. The next is, "Put glass in left cab window. Head light can frozen up and will not burn."

Q. What was there to do to that?

A. To be thawed out was all.

Q. Are those repairs that you have reported on the engine the ordinary repairs that have to be made on engines as you bring them in?

Mr. Rose: The plaintiff objects to that question as calling for a mere conclusion of the witness, when it has been explained.

541 Sustained. Exception.

Q. Now, Mr. Stewart, there has been testimony offered here by Mr. Matthews about the brakes. I want you to tell the jury about the condition of the brakes and the condition of the bell ri*h*ging apparatus? From Cheyenne into Sidney.

Mr. Rose: The plaintiff objects to that question as too remote.

Sustained. Exception.

The Court: The witness may tell the conditions when he arrived in Sidney in the yard in Sidney. The witness may inform the jury. Plaintiff excepts.

A. Well, they were in good condition when I arrived in the yard.

Q. What was the condition of the bell ringing apparatus on that engine?
A. In good condition.
Q. What kind of an appliance did you have for the bell on that engine?
A. An automatic bell.
Q. What kind of an appliance did you have on that engine for the brakes?
A. Westinghouse Brake Valve and automatic Straight air.
Q. And did the bell have both automatic and straight air?
A. No sir.
Q. What kind of air·
A. Automatic.
Q. And did the bell have a cord?
A. Yes sir.
Q. Did you have to cross the public highway in coming with the engine?
A. Yes sir.
Q. In Sidney?
A. Yes sir.

542 Q. Are you able to state to this jury now whether or not that bell was working by the use of the automatic air, when you came into the yards at Sidney?

Mr. Rose: The plaintiff objects to that question as a period entirely too remote under the weather conditions shown here. It is six hours or more before this casualty. The apparatus had then been exposed to snow and weather for six hours.
Overruled. Exception.

A. Well I could not say as to that.
Q. Well, what I am getting at, is whether you could come into the yards without the bell ringing?

Mr. Rose: The plaintiff objects to that question as leading and suggestive.
Sustained. Exception.

Q. Well I want to ask you something about the brakes, further Mr. Stewart. Are you able to state to the jury whether those brakes were in good working order, when you came into that yard with the train·
A. Yes sir.
Q. Could you have brought it in there and operated that train unless the brakes were in good working order?
A. No sir.
Q. These repairs that were noted on this report do they have anything to do with the brakes or the air appliances of the bell?
A. No sir.
Q. They are just simple repairs?

Mr. Rose: Plaintiff objects to that question as assuming. Sustained. Exception.

Witness excused.

543 ASA T. COUCH, called as a witness on behalf of the defendant, was first duly sworn, and testified as follows, upon examination.

By Mr. Strode:

Q. What is your name?
A. Asa T. Couch.
Q. Where do you live?
A. Sidney Nebraska.
Q. You work for the Union Pacific?
A. Yes sir.
Q. And were you employed by the Union Pacific on January 1, 1911?
A. Yes sir.
Q. What was your work at that time?
A. Extra fireman.
Q. Extra fireman?
A. Yes sir.
Q. Where were you employed particularly at that time and prior to that time?
A. I was working nights.
Q. Where, in the yards?
A. Yes sir.
Q. And in what way, what were you doing?
A. What was I doing?
Q. Fireing a *switching* in the yards?
A. Yes sir.
Q. How long had you been employed in that way, prior to this accident?
A. About one year.
Q. About one year?
A. Yes sir.
Q. And you were on the night shift at that time, were you?
A. Yes sir.
Q. Switching there in the yards?
A. Yes sir.
544 Q. And who had the day shift?
A. Mr. Zimmer and Matthews.
Q. Who was your engineer?
A. Parks.
Q. Do you remember the morning of this accident, the morning of January 1, 1911?
A. Yes sir.
Q. Do you remember the engine 213?
A. Right sough of the hotel wash room there.
Q. You got the engine at the time Mr. Stewart came in and left it there?
A. Yes sir.
Q. After you got the engine what work did you do?
A. We made two or three moves, I do not just remember the moves we made.

Q. Switching?
A. Yes sir.
Q. Did you pick up some cars some place, and place them?
A. Yes sir.
Q. You worked until what time?
A. Up until six o'clock.
Q. Then what did you do with the engine?
A. Turned it over to Zimmer and Matthews.
Q. Now did you observe the manner in which this engine worked in the yards there while you were using it?
A. Yes sir.
Q. And particularly about the brakes and the bell?
A. Yes sir, I remember that.
Q. Now just tell the jury how that engine worked as to whether the brakes worked all right, and the bell worked all right, while you were there?

Mr. Rose. The plaintiff objects to that question as too remote, no foundation laid, and also as incompetent.
545 Overruled. Exception.

A. They were working good.
Q. There has been some testimony here, Mr. Couch, that the air on the bell was frozen and the bell cord was broken, now I want you to tell the jury whether you observed the use of that bell while you were working on that engine?

Mr. Rose: The plaintiff objects to that question as a repetition. He said that the bell was working good.
The Court: Answer. Plaintiff excepts.

A. It was working good as I rang the bell by rope.
Q. And why did you ring the bell by rope?

Mr. Rose: The plaintiff objects to that question as immaterial and too remote.
Overruled. Exception.

A. Becau-e we always rang across a crossing, I do not remember whether I had the automatic bell apparatus turned on or not.
Q. Well, in the use of the automatic bell ringer, don't yoo always have to start the bell with a rope?
A. Yes sir, most always.
Q. You had been working there as a part of the switching crew for more than a year?
A. Yes sir.
Q. Prior to this accident?
A. Yes sir.
Q. You may state whether Mr. Cuch,—what the practice was in that yard, about having a man on the foot board of the engine,—the leading end of the engine, to flag you through the yards, or to flag you through the steam and smoke or whether there was any such practice?
A. There was none.

Q. Are you acquainted with the way that the engineers and employees of the company would go to their engines from the wash house where their engines were spotted on the east spot track?

546 A. Yes sir.

Q. And what course was pursued by these engineers and firemen in going to their engines from the wash house?

Mr. Rose: The plaintiff objects to that question as no foundation laid, and no proof that there was any specific way or any regular way whatever. And the fact that one would go one way and another the other would not be any proof that was the only way they went.

Overruled. Exception.

A. They went south of the turn table and north of the main line.

Q. You recognize this map as being the map of the tracks there?

A. Yes sir.

Q. It is where it says turn table on the Exhibit 4, that is the turn table you refer to?

A. Yes sir.

Q. And where it says, main track, and wash house, that is what you refer to by those terms?

A. Yes sir.

Q. Now indicate to the jury the course pursued by engineers and firemen in going to their engines from the wash house where their engines were located on this spot track, as you observed it during the year you were there, as a workman on this switch crew?

A. They went almost straight from the wash house right down to the spot track, and to the engine.

Q. Where would it be?

A. From the wash house right along by the table,—right through there,—and on down there.

Q. Down there? (Indicating).

A. Yes sir.

Q. Is there an open space between the main track and the spot track?

547 A. Yes sir.

Q. And is that the space that was used in going down there?

A. Yes sir.

Q. Did you ever see an engineer or did you ever see a fireman in the time you were there in that service, walking down the main track, between the rails of the main track, on his way down to that spot track?

Mr. Rose: The plaintiff objects to that question as immaterial, as to what he saw, and not proper evidence in chief.

Overruled. Exception.

A. No sir, I never.

Cross-examination.

By Mr. Rose:

Q. How many times did you cross Rose Street with this engine that morning between five forty and six o'clock?

A. I remember crossing twice, or two times.
Q. And you rang the bell both times with a cord?
A. Yes sir.
Q. Then the bell wasn't ringing except when you rang it with the cord, was it?
A. I don't remember whether he had it turned on or not.
Q. (Last question read as follows:) Then the bell wasn't ringing except when you rang it with the cord, was it?
A. Yes sir.
Q. It was?
A. Yes sir.
Q. Well, if it was ringing, anyhow, why did you ring it with a cord, both times you crossed Rose street?
A. I was so used to ringing with a cord on a switch engine, I just kept on ringing.
Q. So you had a double whack at it,—and to be sure that the air would not fail you took hold of the cord and helped out,—is that what you mean?
548 A. No sir.
Q. You testified in this case last May?
A. Yes sir.
Q. And you testified then that both times you crossed Rose Street, you rang the bell by taking a hold of the cord?
A. Yes sir.
Q. In answer to Mr. Strode?
A. Yes sir.
Q. And then in answer to my cross examination?
A. Yes sir.
Q. Did you ever see any bulletin posted up in those yards to inform the engine men what course they should take in going from the wash house to the spot track?
A. No sir.
Q. Were there any placards posted up on places in the yards, saying, "This course for the engineers to go from the wash house to the spot track?
A. I don't think there was.
Q. Can you tell me who if any officer of this company, ever promulgated any orders up in the yards, on that subject?
A. No, I don't remember.
—. You don't remember of ever seeing any such orders?
A. No sir, I never did, see a bulletin board.
Q. Did you ever see those yards when they were drifted with snow and when the only open way was the main line track,—this is the only way that was cleared with snow?
A. No sir.
Q. You never saw snow there,—was there any snow there on the morning of January 1st, 1911, when you quit work there, Mr. Couch?
A. Yes sir, there was some.
Q. Was there any wind blowing at that time?
A. Yes sir.

Q. What was the temperature?

549 A. About ten or fifteen below zero.

Q. As a matter of fact the engine men were left to pursue their own course when they left the wash house?

A. Yes sir.

Q. And sometimes an engine would be on the west spot track, and sometimes on the east spot track?

A. Yes sir.

Q. And you have seen them go different directions, haven't you,—different men going different ways?

A. I believe I have, yes sir.

By Mr. Strode:

Q. But you never saw a railroad man walking down the middle of the track in the middle of the yards?

Mr. Rose: The plaintiff objects to that question as a mere repetition.

Sustained. Exception.

Q. That is one thing any railroad man didn't do, isn't it, in the yards?

Mr. Rose: The plaintiff objects to that question as incompetent, and a mere repetition.

Sustained. Exception.

Mr. Rose: They go everywhere.

Mr. Strode: I except to that statement of Mr. Rose's unless he wants to go on the witness stand.

Mr. Rose: Well let him answer the last question then.

Q. (Last question read as follows:) That is one thing any railroad man didn't do, isn't it, in the yards?

A. No sir.

By Mr. Rose:

Q. Do you know a track in the yards, that engine men and people don't walk across and on?

Mr. Strode: The defendant objects to that question as improper cross examination.

Overruled. Exception.

550 A. No sir.

By Mr. Strode:

Q. But you don't know a place in the yards where the railroad men working in the yards, or engineers would walk down between the rails of a track?

Mr. Rose: The plaintiff objects to that question as a mere repetition.

Overruled. Exception.

A. No sir.

Witness excused.

551 S. C. WHEELER, called as a witness on behalf of the defendant, was first duly sworn, and testified as follows upon examination.

By Mr. Strode:

Q. What is your name?
A. S. C. Wheeler.
Q. Where do you live?
A. Lincoln, Nebraska.
Q. Mr. Wheeler, are you in the service of the Burlington Railroad Company?
A. Yes sir.
Q. And in what capacity?
A. Air brake instructor.
Q. Over what territory, or what is your jurisdiction?
A. All of the Burlington system west of the Missouri River.
Q. And as air brake instructor, what are your duties.
A. To instruct engine men,—that is, engineers and firemen, and conductors and brakemen, and car men, and so forth, in the proper handling of the air brake, on engines and cars.
Q. Where do you give these instructions to these men?
A. I have an instruction car, that is equipped with a system of brake apparatus, that we operate just the same as we would a train.
Q. And that is your constant work?
A. Yes sir.
Q. How long has it been your duties in connection with the Burlington system?
A. As an air brake instructor, since 1905.
Q. Prior to that time were you at any time an engineer on the Burlington?
A. I served 20 years as a locomotive engineer.
Q. Are you acquainted with the braking appliance that is involved in this accident. Air brake New York, number 5,
552 and the appliance is known as Number two?
A. If it is the B2, I am.
Q. Yes sir?
A. Yes sir, I am.
Q. Now the B2, refers to what portion of the appliance?
A. The automatic brake valve.
Q. The New York Air Pump Number 5?
A. Yes sir, refers to the size and classification of the air pump.
Q. What makes up the mechanism of this New York Air Pump Number 5, and the B2,—brake valve,—B2 that you refer to?
A. The B2 brake valve that refers to the automatic brake valve,—by which the engineer handles the brakes on the engine and the train. Th air pump is simply the pump that compresses the air that is necessary for that use.
Q. What are the principle parts of this particular equipment, this brake equipment, that was on this engine 213?
A. Well, there is an air pump?

Q. Where is that located on the engine?

A. I am not familiar with that engine, but it is customary to put them on the right side of the boiler, of later years.

Q. What function does that air pump perform?

A. It is operated by steam and compresses air first into the main reservoir.

Q. Then the main reservoir, that is on the engine?

A. Yes sir.

Q. And what function does that perform, and what is it there for?

A. It is customary to have two and sometimes three large reservoirs all connected together to make a large volume of air, started in that capacity for releasing the brakes and charging the train.

Q. So that the air goes from the air pump to this main reservoir?

A. Yes sir.

Q. And it is compressed air?

A. Yes sir.

Q. Now from the main reservoir, where does it go to be
553 applied to the brake?

A. It passes from the main reservoir by a separate pipe from the one it enters it, to the engineers brake valve.

Q. And what function does that perform in the application of this brake?

A. The brake valve combined with the feed valve, supplies and regulates the pressure to the brakes on the train.

Q. So that the air comes from the air pump to the main reservoir, and from the main reservoir through the brake valve to the brakes?

A. Yes sir.

Q. And how is the air applied to the brakes on the train at that point?

A. Well did you wish me to say how the air is applied on each car.

Q. No, on the engine alone, because that is all that is involved here?

A. For the engine and tender, there is what is known as the auxillary reservoir, and in this reservoir,—each of those reservoirs contain air that is applied to the brake cylinder on the engines, and the tender automatically by the tripple valve, that is connected to them.

Q. Now what is the construction of the brake cylinder, where the air is applied directly to that point?

A. It has a cylinder that usually is about 12 inches long, and they vary from eight to eighteen inches in diameter according to the equipment they are placed on.

Q. And what is the mechanism of that,—how does that air apply that air through the brake cylinder?

A. The automatic action of the tripple valve,—when the engineer reduces the pressure in that brake pipe, the automatic action of the triple valve, would take a certain amount of air from this auxillary reservoir, admitting to the brake cylinder. The cylinder had a piston in it, comprised of a piston head and packing leather, and a follower head, and an expander ring, and this packing leather is so expanded

by that ring that when the air is admitted to the cylinder, this
554 packing leather makes an air tight joint on the walls of the cylinder, and the pressure of air coming in there will force this piston out through its connection with the brake levers and the rods, and the brake beams will force the brake shoes against the wheels, applying the brake.

Q. Does that air operate in that cylinder and upon those pistons in the same way or practically in the same way that the steam operates upon the pistons in the steam cylinders?

A. Very much so.

Q. Drives the steam back and forth?

A. No sir, in one direction.

Q. Now, what function does this main air chamber perform with reference to this appliance?

A. The main reservoir is used for promptly replacing the air in the brake system that has been used in making a stop or an application of the brake.

Q. Is there any difference in the temperature of the air as it comes from the air pump and the temperature of the air as it is finally to be applied to the brake?

A. Yes sir.

Q. How does that arise, and what is the,——

A. The air is heated to some extent during the compression, or as it passes through the pump, and when it leaves the pump it is at the highest temperature. As it passes into the main reservoir, or a system of these reservoirs, coupled together, it cools. And when it cools down to somewhere near the temprature of the atmosphere surrounding those reservoirs, it comes down to about the temperature of the atmosphere. Well, it will do that before it passes the main reservoir.

Q. And what is one of the functions of this reservoir, with respect to the change in this air?

A. It is not only to use the volume of the reservoirs for storage capacity, fur they are used as traps to catch the moisture that
555 is in the air, having been compressed by the pump.

Q. And of the means being there for that purpose, amoung others is to trap the moisture.—what means is there for relieving the reservoir of this water?

A. Each reservoir has a drain cock on its lower side to drain it.

Q. Now from the time the air pump is put in operation, such an air pump as was involved here, from that time, is there or is there not, constant condensation going on, and the accumulation in this air chamber of water from that condensation?

A. There is always more or less moisture, going in with the air, dependent of course on the humidity surrounding the engine. For instance in rainy weather we may expect more moisture than in dry weather.

Q. So that one of the purposes of this air chamber is to trap that moisture so that it is not carried into the brake system on the train?

A. Yes sir.

Q. Where there is a long string of cars?

A. Yes sir.

Q. Now what effect does that moisture or water, resulting from the condensation on account of the change in temperature of the air, have upon the effectiveness of the brake appliance of the engine and tender, where there is only an engine and tender involved in the matter?

A. None at all, if it is reasonably cared for.

Q. What effect would it have in any situation,—the presence of a gallon or two gallons or any amount of water, below the point where the air is admitted, to that air chamber. That is, assuming that the air has free access to the chamber through the pipe that leads into the chamber, and free access out of it, by the pipe that leads out of it. Then what effect would the presence of

556 wat*h*er have in that reservoir?

A. None at all, not unless you might say, over flowed.

Q. Yes sir, reached into these pipes where the air came in at?

A. Yes sir.

Q. Would it reduce the capacity of the air chamber to the extent that that water occupied that chamber?

A. I don't just catch that question.

Q. Well, the air chamber will hold so much compressed air with water in it?

A. Yes sir.

Q. And that water in it,—with water in it, it will hold less?

A. Yes sir.

Q. Now does it have any other effect as far as the engine and the tender is concerned, than simply to reduce the amount of the air that is in this air chamber?

Mr. Rose: The plaintiff objects to that question as leading.

Overruled. Exception.

A. No sir.

Q. How much do one of these air chambers, such as was on this engine,—the main reservoir,—how much would that air chamber hold, before it would in any way effect the operation of that brake on the engine, and tender itself?

A. Well, from my observation of that reservoir, it is undoubtedly about eighteen and one half inches in diameter, and possibly eighty-four inches long, and seven or eight gallons would not effect it.

Q. How long would it take to accumulate seven or eight gallons of water in that reservoir, in the ordinary operation of that engine?

Mr. Rose: The plaintiff objects to that question as not a question of science, and because he has already testified it is variable according to the weather conditions.

Overruled. Exception.

557 A. It would vary according to the moisture in the air, but under ordinary circumstances it would not accumulate that much water in fifteen hours of work of the pump.

Q. Do you know where the air is admitted to this air reservoir, and where it is taken out with respect to the center of the air reservoir?

A. Well, I am not entirely familiar with the Union Pacific practice, but it is customary to connect it right to the center. About on

each end of the center. Sometimes the discharge pipe from the bottom is connected with the forward end of the reservoir, and sometimes to the rear end, but they are about the center.

Q. So that until it was half full of water, it would not interfere with the,——

A. It would have to get half full, before the water would slop over.

Q. If there wasn't any reservoir on there at all, as far as the engine and the tender was concerned, would the air pump be sufficient in itself to apply the brakes to that engine properly?

A. Yes sir.—It might give them a little slower release of the brakes, but *It* would not hinder the brake application in any way.

Q. That is, the direct application from the air pump to the brake itself, would be sufficient for proper application of the brakes to the engine and tender alone?

A. Yes sir.

Q. This air chamber is more particular to take care of the maximum demand upon that brake appliance, where you have the whole train to stop?

Mr. Rose: The plaintiff objects to that question as leading—— Sustained. Exception.

558 Q. Now how is the steam applied to the air pump?

A. There is a direct conection between the locomotive boiler and the steam cylinders of the pump.

Q. And what is the temperature of that steam; about what would be the temperature of the steam that would be applied to the air pump in order to operate the air pump?

A. If the pressure in the boiler is two hundred pounds, per square inch, the temperature of the steam would be 288 degrees about.

Q. And that is applied directly from the boiler to the pump?

A. Yes sir.

Q. By what means, or in what way?

A. Through the steam pipe, and air pump governor, in that line.

Q. Now while,—now what device in connection with this air pump, New York Number 5, is there on that pump to provide for live steam going through that pump at all times?

A. There is a governor,—it is called an air pump governor,—located on this steam pipe close to the pump,—and the governor is so arranged that when the compression of the air in the main reservoir or the brake pipe reaches the maximum desired to be carried, the govrnor shuts off a large volume of the steam from the pump,—that is, it stops the pump and reduces the speed of it down so that it will not pump any more than the pressure of air required. But when that governor valve closes there is a small port that is opened, which is about a sixteenth of an incy, in diameter, that will admit a constant flow of steam to the pump to prevent its stopping entirely, and also to maintain a high temperature of steam in the pump to prevent any condensation forming there,—while the governor valve is closed,——

Q. So that that pump at all times whether in active operation or not is subjected to live steam isn't it?

559 A. Yes sir.

Mr. Rose: Wait. The plaintiff objects to that as leading and suggestive.

The Court: He has already answered the question.

Overruled. Exception.

Q. Do you know when this Port that is placed there to that governor, so as to admit the escape of live steam, when that was first devised on this particular appliance?

A. It has always been there, since I know of. Such a thing as a governor for this air pump.

Q. It has always been in that appliance?

A. Yes sir.

Q. To allow the steam to go on through there?

A. Yes sir.

Q. Does the small amount of steam that escapes out through this port, does that in any way, allow the steam to keep the engine or the pump in acton, or moving very slowly?

Mr. Rose: The plaintiff objects to that question as leading, and already explained.

Sustained. Exception.

Q. Does the pump, on account of this vent, or port, where the steam passes on through, at all times,—does the pump at any time, then while the engine is fired up, come to an absolute stop?

A. It will, if the throttle for the pump is closed in the cab.

Q. But if that is working?

A. It will not stop entirely

Q. It moves a little all the time?

A. Yes sir, very slowly.

Q. Can that appliance, or does that appliance freeze up?

A. I never knew it to, in all my experience.

Q. There is testimony here of a man by the name of Finch, and I want to get your testimony in regard to that, to know whether that could freeze?

560 A. Not if the throttle was open.

Mr. Rose: What do you refer to now?

Mr. Strode: The air pump itself.

Q. Would the air freeze at any point between the point where it is pumped in, and the point where it is applied on the brakes?

A. No sir, not unless the engine had been sadly neglected.

Q. And in what respect would it have to be neglected?

A. Neglect to drain the main reservoir.

Q. And that would be a case of where the main reservoir had filled up with water?

A. Yes sir.

Q. So that it would,—the air would not be admitted into it, and out of it?

A. Yes sir.

Q. And then it would be a case of the water freezing in the air?
A. Yes sir.
Q. If that reservoir was full of water, the air could not be admitted into it, and could not find its way out of it, and the air brakes could not be applied at all?
A. They could be applied to the engine, possibly not to the tank.
Q. Where would the air come from that would be applied on the brakes?
A. From the auxiliary reservoir, if it is applied with the automatic valve.
Q. And on each engine, in this appliance, there is an auxiliary air drum besides the main air drum?
A. Yes sir.
Q. And that is for the purpose of trapping moisture, is it, or what is it for?
A. Very little moisture ever comes to the auxiliary reservoir itself. It is used for operating the brake on the vehicle
561 it is placed upon, an engine, tender or car.
Q. But in this particular instance, it would be there more particularly to operate the engine or tender?
A. Yes sir.
Q. Now with the main air chamber not supplying the air, the auxiliary air chamber would supply sufficient air for the engine and tender?
A. Yes sir. The understanding is, Mr. Strode, that when the brake is released,—these auxiliaries will recharge promptly.

Cross-examination.

By Mr. Rose:

Q. It is a fact that the formation of ice about a valve will put it out of commission for the time being until the ice is melted?
A. What valve do you mean?
Q. Any valve?
A. If it was frozen, yes sir.
Q. And it is true with switching appliances, that move back and forth, if you let the water get in there and freeze, for the time being you put the switch appliance out of commission?
A. If there was water there, and it froze, it would undoubtedly effect it.
Q. Now suppose the main reservoir has been operated on an engine, that has been run for forty-eight hours without being relieved, or being housed, should accumulate water, so that it reaches the exhaust air pipe, or supply air pipe, how would that effect the valves in pipes, in temperature that was 15 degrees below zero?
A. Very often on the engine and tender alone, the air is warm enough to prevent its freezing. As long as it is operated it
562 will not freeze.
Q. (Last question read as follows:) Now suppose the main reservoir has been operated on an engine, that has been run for forty-eight hours without being relieved, or being housed, should

accumulate water, so that it reaches the exhaust air pipe, or supply air pipe, how would that effect the valves in pipes, in temperature that was fifteen degrees below zero?

A. If the water was or had got into the pipes, it would be very apt to freeze.

Q. Now if the water has accumulated in such quantities in the main reservoir so that it spills over into the pipes that lead from there to the auxillary reservoir, wouldn't it be possible to carry some water into the auxillary reservoirs under those circumstances?

A. It would more than likely stop at the tripple valve in the drain cock.

Q. Now these appliances are exposed to the weather, aren't they?

A. Yes sir.

Q. And the influence of the heat from the locomotive boiler is largely neutralized by the cold *once* when the temperature is below zero?

A. Yes sir.

Q. The constant changing of air will prevent their being influenced very much by the heat of the boiler under those circumstances?

A. In cold weather the heat of the boiler would have little or no effect upon the operation of the tripple valve.

Q. And particularly where there is a high wind blowing?

A. Yes sir.

Q. Now in the case of the steam pipe leading to the air pump, and the exhaust from that,—that is controlled by a separate throttle, is it?

A. The throttle for the air pump is located in the cab.

Q. Well, it is separate from the throttle that controls the
563 *the* supply to the locomtive engine?

A. Yes sir.

Q. It is a separate one?

A. Yes sir.

Q. Now when that separate throttle is closed, there is no movement of steam through the air pump then, is there?

A. No sir.

Q. And in those circumstances, there would be condensaation, wouldn't there?

A. Yes sir, very apt to be.

Q. And when there is condensation, if water accummulates, there and the device is exposed to the air, on a cold day such as I have mentioned, and the wind is high, and the thermometer fifteen degrees below zero, then whatever water is there, would freeze?

A. It is very apt to.

Q. And in order to put the equipment into commission again, it would have to be thawed?

A. It would if it was frozen.

Q. Of course I suppose it would be thawed out in time, by opening the throttle,—the steam being admitted to the pump would thaw it out in time?

A. Yes sir, in a great many cases, unless they were frozen full.

Q. Well, it would not remove the frost about the cylinders,—accumulated about the cylinders,—the pump would not remove that would it?

A. What cylinders do you refer to?

A. Well I mean about the pistons that control the setting of the brakes?

A. In the brake cylinders?

Q. Yes sir—suppose the pistons there became covered with ice for any reason, and would not take hold, would the mere pumping of air in weather like that, remove the frost or melt the ice about the piston?

A. It would not melt it on the outside,—it might pos-ibly
564 take the chill off of the inside, but it would not have any effect on the outside.

Q. Is air under a high pressure warm or cold?

A. When it is first compressed, it is quite warm.

Q. Well of course it comes in contact with the moving pistons and compressing machineries that heat from friction, and they heat it, before the air attains a high pressure. But what is the effect upon the temperature of air, to put it under high temperature, does it cool it or heat it?

A. It heats during compression, and it will cool when it becomes inactive, after it is compressed.

Q. Now, have you ever seen these drums,—have you ever felt of a drum that had the maximum pressure on?

A. Yes sir.

Q. Or one of these reservoirs?

A. Yes sir.

Q. Well, is it cold or warm,—when it has the maximum pressure on?

A. The one nearest to the pump will be warm,—where, if there is two or more on an engine, the one furthest from the pump in the line of piping will be cool.

Q. Will it be cooler than the outer atmosphere?

A. No sir.

Q. And you speak that scientifically, as a scientific physical fact do you?

A. Yes sir.

Q. That air under pressure does not become colder than the outer atmosphere?

A. No—not while it is in action, no. It can be drawn down.

Q. Let me ask you, Mr. Wheeler, if it is not a fact that the process of compression itself, extracts the heat, and it is the extraction of the heat that tends to make the air in the outer chambers warm, while the process of pumping is going on?

A. Not as I understand it. The air is heated during com-
565 pression, as I understand it.

Q. Isn't it a fact that if the process of compression is continued, the air under compression will unavoidably become so cold that it will even freeze mercury, no matter what the temperature of the outer atmosphere is?

A. It will,—the air, as I understand it heats during compression. If you understand,——

Mr. Rose: The plaintiff moves to strike out the answer as far as he has gone as not responsive to the question.
Sustained. Exception.

Q. (Last question read as follows:) Isn't it a fact that if the process of compression is continued, the air will under compression unavoidably become so cold that it will even freeze mercury, no matter what the temperature of the outer atmosphere is?
A. I do not know that it does.
Q. Isn't it a fact that one of the most efficient means known for refrigeration, at the present time, is the use of compressed air?
A. I believe it is.
Q. It is a fact that the compression alone makes air efficient as a refrigerator agent?
A. As I understand it, it is a reduction of the pressure, and its expansion that produces this cooling effect.
Q. Then when you take a cylinder of air compressed to the point of liquifaction, if you would put your hand on that cylinder, you would find it the same temperature as the outer air?
A. I believe you would, that is if it had time to cool.

By Mr. Strode:

Q. This braking appliance,—this New York Number Five, pump and the B2, referred to, is constructed to take care of passenger engines, and passenger engines, and passenger trains, and freight trains of all kinds, in all kinds of weather, and under all conditions?
566 A. Yes sir.

Mr. Strode: That is all.
Mr. Rose: No further examination.
Witness excused.

J. O. MARS, called as a witness on behalf of the defendant, was first duly sworn, and testified as follows, upon examination.

By Mr. Strode:

Q. What is your name?
A. J. O. Mars.
Q. You are in the service of the Union Pacific Railway Company?
A. Yes sir.
Q. At Omaha?
A. Yes sir.
Q. In what particular service?
A. Foreman of the air brake equipment.
Q. Over what territory?
A. It includes Omaha and Council Bluffs, and repairs on the road generally.
Q. What are your duties as foreman of the air brake equipment?

A. To see that the air is in good repair, and to see that the equipment is in good repair, and they are repaired in the right kind of shape, and they go out there without any flaws, and also the man on the train, who has the cleaning of the air brake and the construction of the air brake, on the passenger cars and freight cars, and so forth.

Q. How long have you been in that branch of the service?

567 A. Just for the Union Pacific, you mean?

Q. Yes sir.

A. Five years.

Q. Were you in that branch of the service for any other road prior to that?

A. Yes sir.

Q. What roads?

A. The C & A and the Wabash.

Q. Do you know what kind of air brake appliance was on this engine 213, on January 1, 1911?

A. Yes sir.

Q. You may describe the appliance, and tell the name of it, and the number and size?

A. It was a number five air pump, and it was an automatic and straight air. As I understand it, of the New York Air Brake people, known as B2.

Q. B2 what?

A. Valve,—brake valve. They sometimes use in this engine, a valve that is known as the F6, Westinghouse. They use that valve sometimes on this class of engines. Either one perform the same function.

Q. What was the princip-le features of the parts of this air brake equipment on this engine and tender, 213?

A. The auxil*l*ary reservoir on the tender,—on the engine and tender, you say?

Q. Yes sir.

A. The air pump is located on the left hand side, and there is one drum horizontally located on the left side, on the running board, and one perpendicular drum right back on the left side,—back of that on the left side, and one drum on the right side. The engineers brake valve is located along side of the cab over the right hand drum, or at the most convenient place to the engineer. The auxil-

*l*ary reservoirs are located on the right hand side, under-

568 neath the running board of the engine equipment. The tank equipment has an auxil*l*ary reservoir, a tripple valve of its own located on the tank.

Q. What tank is that?

A. The tank brake. It has an auxil*l*ary reservoir and triple valve of its own located on the tank. Then they have cylinders and levers and rods connected on it.

Q. Now the air pump, where is that located on the engine?

A. The left hand side.

Q. Oh, anywhere on the left hand side?

A. That is the proper location of it.

Q. Where is it?

A. On the left hand side, in front of the fireman about midway of the boiler,—right there, (Indicating on a picture of the locomotive).

Q. Calling your attention to Exhibit 5, will you indicate on this exhibit where the air pump is located on this engine, on this exhibit?

A. Here. (Indicating.)

Q. Now is it located in the point of the line running to figure one?

A. Yes sir.

Q. Down on the side of the engine?

A. Yes sir.

Q. Is it in two parts there, one below and one above?

A. The air pump is constructed in two parts, and they are all fastened together.

Q. What is the lower?

A. The lower is steam.

Q. And what is the upper?

A. The upper is air,—the air end of it.

Mr. Strode: The defendant offers in evidence Exhibit number 5. No objection.

569 Exhibit 5, received in evidence without objection, and the same is hereto attached and made a part hereof.

Mr. Rose: Is that the air pump you are showing him or the piston for applying the air to the brakes?

A. The pump that is used to supply the air for the brake, is that what you mean?

Q. We want to know whether that is the air pump you have been talking about on number 5?

A. Yes sir, that is the air pump.

Q. Now where is the main reservoir on this exhibit,—on this engine 213, and was it at that time?

A. There. (Indicating.)

Q. Shown here on the picture?

A. Yes sir.

Q. At the end of the line Two on the engine?

A. Yes sir.

Q. That doesn't show the full length of it?

A. No sir.

Q. The picture cuts off part of it?

A. Yes sir.

Q. Calling your attention to exhibit 13, is that a picture of the engine 213, and of the reservoir, as it was on that engine at the time of the accident?

A. Yes sir.

Q. Now does that show,—is the main reservoir shown on this picture of the engine?

A. Yes sir.

Q. And at the end of main line one?

A. Yes sir.
Q. How long is that reservoir?
A. Oh, I should judge about 12 feet, something like that, 10 or 12 feet. I could not exactly tell.
Q. And what is the diameter of that reservoir?
570 A. In the neighborhood of 16 inches in diameter, it might be possibly less or more, something like that. Sixteen inches, is close enough.
Q. And where is the air admitted into the reservoir from the pump with reference to the center or to the side of the,——
A. That is in the center.
Q. In the end?
A. Yes sir.
Q. Where does it pass from that reservoir?
A. From the end close to the center,—the other end.
Q. The other end?
A. Yes sir.
Q. At the center, or close to the center?
A. Well, close to the center. Generally they aim to get them above the center if they possibly can,—it is either at or a little above the center a little bit.
Q. Have you prepared a diagram here, or a blue print showing the location of air brake appliances of this engine 213 as it was there on January 1, 1911.
A. Yes sir.
Q. Calling your attention to Exhibit 14, you may state what that Exhibit is,——
A. That is a blue print of 813, of the same class engine.
Q. A blue print of what?
A. Of the same apparatus.
—. ——.
A. Yes sir.
Q. Prepared by yourself?
A. Under my direction?
Q. Now does that show in the blue print, the main drum you have just referred to?
A. Yes sir.
Q. Does it show the place where it is discharged from the main drum?
Yes sir.
571 Q. Now does this picture,—on this picture Exhibit 13, what is this drum right under the main drum?
A. That is the second main drum,—what is known as a main drum.
Q. Is that a part of the main drum?
A. Yes sir.
Q. It i sshown right under it, and at the end of line two?
A. Yes sir.
Q. And how is that drum connected with this portion of the drum that lies under,—
A. Connected with the pipe.

Q. How long a pipe?
A. A short pipe.
Q. Extends out and down how far?
A. I should judge it would be only about four or five feet in length. All over it would not be that,—would not be hardly that much.
Q. And what is the size of this drum there at the end of line Two?
A. It is twenty four by thirty six, I think. I would not be posit-ve though, there might be a little difference in the figures.
Q. You speak of that do you as a part of the main drum?
A. Yes sir.
Q. Is that the auxil*l*ary drum you have referred to?
A. No sir.
Q. This you speak of it a part of the main drum?
A. Yes sir.
Q. Where is the auxil*l*ary drum?

Mr. Rose: He spoke of an auxil*l*ary drum on each side of the engine.

A. I beg pardon, I didn't. There is three main drums on that engine.
Q. And in addition to the main drums there is what?
572 A. There is what they call the auxil*l*ary reservoirs, and not a drum.
Q. Where are these three main drums you speak of.
Q. One located horizontially there, and one perpendicularly, on the left hand side.
Q. Now those are two?
A. Yes sir. Now there is another one just opposite that one, over on the right hand side.
Q. Is it a duplicate of the one that is shown here?
A. Yes sir.
Q. The same size and located at the same place o nthe right hand side?
A. Yes sir.
Q. That is shown on this exhibit 10?
A. Yes sir, that is it.
Q. Now where is the auxil*l*ary drum you refer to?
A. It is shown in the other picture on the left hand side of it,—right in front of the pump.
Q. Now is the auxil*l*ary drum shown at the end of line three?
A. Yes sir.
Q. That is on the left hand side of the engine?
A. Yes sir.
Q. Is there only one auxil*l*ary drum on this?
A. There is one in the tank too. On the engine proper there is only one auxil*l*ary, and one auxil*l*ary reservoir on the tank.
Q. And then there is one on each car?
A. Yes sir.
Q. Now the distance from the air pump to the main drum is how far, about?

A. Oh, it is a very close distance there. There has been,—there isn't but a very little distance there. There might be two feet of pipe there.

Q. Now where is the air conveyed from the pump?

573 A. Into the main drum.

Q. And where does it pass from the main drum?

A. In through a pipe to the next main drum.

Q. And where does it pass from that main drum?

A. From that main drum onto the right hand side.

Q. And where does it pass from that drum?

A. Up through suitable pipes to the brake valve.

Q. Does the picture show here the brake valve you talk about, and mentioned,—does the picture show that?

A. Not on that side, no sir.

Q. Does it show it here?

A. Yes sir.

Q. Where is it?

A. Right there?

Q. In the engineer-s cab?

A. Yes sir.

Q. Well then where does it go from that point in the engineer's cab?

A. It goes to the auxil*l*ary reservoir,—that is the automatic, you are talking about?

Q. Yes sir?

A. It goes from the engineer-s brake valve to the auxil*l*ary reservoir, and then to the brake pipe and from there to the cylinders.

Q. Shown on this picture?

A. No, you can't distinguish them.

Q. Well, the air is pumped into this main res-rvoir and then goes through the brake valve in the engineer-s cab, and back to the auxil*l*ary ohrough an air brake,—to the air cylinders at the brake?

A. Yes sir.

Q. Now what portion of that air appliance, if any will

574 freeze in cold or stormy weather,—cold and stormy weather in the winter time?

A. If the pump is working there is no danger of the air freezing,—of the air apparatus freezing on it. And looked after properly.

Q. If the pump is working?

A. Yes sir.

Q. What works the pump?

A. Steam from the locomotive boiler.

Q. Well the steam is not subjected to freezing, as long as it is moving steam?

A. No sir.

Q. You never knew of an instance where steam froze?

A. No sir.

Q. Well what device or appliance is there on that portion of the appliance operating the pump to guard against any freezing in that portion of the appliance.

A. Why the pump governor has a hole drilled through the wall of the governor, up high enough, so that any obstructions or anything can get into it, and it is about a sixteen opening, and that is open all the time to the pump. It runs the pump slowly, and in order to keep away from the condensation, and also to guard against freezing,—that is what it is put in there for. It is put in there to keep the pump hot, and keep it moving slowly, and that is what it is put in there for.

Q. Does that allow at all times, steam to be passing through that pipe, and up past the governor, and at all times acting upon the pump?

A. Yes sir.

Q. And the only way that the steam can be cut off,—live steam, moving through the pump,—is by turning it off in the engine,—closing the throttle?

A. Yes sir, closing the pump throttle,—not the throttle of the engine, but the pump throttle.

575 Q. And the purpose of that port, or little hole in the governor, at the pump, is to allow steam to be moving all the time?

A. Yes sir.

Q. And the pump to be moving all the time, but at all times, slowly? Is that right?

A. Yes sir.

Q. And where the steam is moving in that way, even though the governor is shut off, do you cut the steam off of the pump by the action of the governor?

A. No sir, you do not shut the steam off.

Q. Do you shut a portion of it off?

A. Yes sir, you shut the larger portion of it off.

Q. It is a sufficient volume that is let through there to prevent the air freezing?

A. Yes sir, there is quite a volume gets through the sixteenth hole.

Q. And with that device there, did you ever know in your experience, of an air pump freezing on an engine?

A. No sir, not with the throttle open.

Q. If you take the fire out, and leave the water in the boilers, it will freeze?

A. Yes sir, most assuredly.

Q. Water, in and about an engine, will freeze the same as it will freeze anywhere else?

A. Yes sir.

Q. That appliances is on those engines to operate the steam and operate the pump under all conditions in all kinds of weather, isn't it?

A. Yes sir.

Q. To take care of trains,—of passenger and freight trains under all conditions of weather?

A. Yes sir.

576 Q. And if that pump, didn't work, is there any other device upon these trains, that move over the Union Pacific,—freight and passenger trains, for braking or to apply the brakes

upon the trains,—if your air pump is frozen, or is, by its construction, so constructed thaat it would freeze under any conditions, would there be any way that you could apply the brakes upon a passenger train, that is being operated over that line?

A. Do I understand you that,—

Q. I am trying to get at, if it doesn't have to be so constructed that it won't freeze, because it is the only way that you can apply brakes upon your trains?

A. Yes sir,—that is all.

Q. And the same pump takes care of your passenger trains that takes care of your freight trains?

A. Yes sir.

Q. Now, after the air leaves the pump, it goes into this main reservoir?

A. Yes sir.

Q. Now, what is that reservoir,—what is the function that that reservoir performs in the application of the brakes on the engine and tender, or upon the trains?

A. That main reservoir is there for catching the condensation and also the water, in any form, or anything that gets in there. And it also,—the air is used from the main drum to set the straight air brake with, and also the air is used from the main drum for to charge or re-charge the train line.

Q. Well formerly were these brakes applied, without any air drum, and applied directly from the air pump?

A. Yes sir.

Q. And in that situation, the application of the brakes was interfered with on account of condensation in the air brake system,—in the pipes?

577 A. It was fully not satisfactory.

Q. So that one of the functions as I under- you of this reservoir, is to trap and hold the condensation of the water?

A. Yes sir.

Mr. Rose: The plaintiff objects to that answer and moves to strike it out as having been given before we had a chance to object.

Sustained. Exception.

Mr. Rose: The plaintiff objects to the question as leading.

Sustained. Exception.

Q. What is the capacity in cubic inches of the main reservoir?

A. There is a variation there. They are all nothing less than fifty thousand, and they run up to over sixty thousand.

Q. Cubic inches?

A. Yes sir.

Q. And what would that capacity be in gallons of water, about Mr. Marse?

A. Oh, I could not say exactly. That one drum there,—that first drum there,—I suppose would be in the neighborhood of a couple of barrels.

Q. Of water?

A. Yes sir,—and the others in proportion.

Q. And how much water would have to be in that drum to interfere with the air brakes in that engine, and tender.

A. It would have to be over half full or very close to half full so that it would slop over in the discharge pipe there.

Q. What effect would water in that air drum have upon the application or the efficiency of the brakes on the engine and tender?

A. If, it wasn't more than half full?

Q. Yes sir, if it wasn't full up to the point where the air could be admited to the chamber?

578 A. So that it could be admitted; it would not have any effect upon the brakes materially.

Q. Would it have any other effect than simply reducing the capacity of the chamber to hold air?

A. Not with that kind of an engine.

Q. Or any other kind of an engine?

A. No sir.

Q. By filling that half full of water, you would reduce the capacity of your air chamber, one half?

A. Yes sir, that is all.

Q. Now what is the capacity of that air chamber,—what is the maximum capacity of that as far as taking care of,—is that air chamber there, with the other air drums on this engine, of sufficient capacity to take care of the engine and tender and the train, in addition to the engine and tender?

A. Yes sir.

Q. About what portion of the demands upon this air appliance would be required in the braking for the engine and tender compared with the train of cars say of sixty or one hundred cars?

A. You would have to pump a great deal less air, there would not be near the work required of that air pump to pump the switch engine up, or the yard engine.

Q. How many freight cars would this brake appliance on this engine take care of?

A. 60 to 80.

Q. How many cars,—particularly freight cars, would take up the demand of the engine and tender itself, upon this brake appliance?

A. In a general freight train?

Q. Yes sir?

A. Sixty.

579 Q. Well, you didn't understand my question. If this brake appliance takes care of the engine and tender, and sixty to eighty cars, how many cars would be the equivalent of the demand made upon this brake appliance by the engine and tender?

A. I don't understand the question.

Q. Well does *does* the engine and tender make the same demand upon this brake appliance,——

A. No sir.

Q. That two cars would make?

A. It is greater with two cars.

Q. Well how many cars in that train would be the equivalent of this demand upon the engine and tender?

A. 60 to 80.

Q. No, that is not my question. I am trying to find out from you if I can, about what demand upon this brake appliance, that is on the engine, is required in stopping the engine and tender alone, compared with the amount that is required to stop a single car or two cars?

A. Why it doesn't require as much to stop the engine and tender alone, as it does the engine and tender and two cars,—it depends upon the weight of the cars, or the train you have behind you.

Q. That is, the question of weight would determine in the matter of equa*il*zing the demand?

A. Yes sir.

Q. Well, would three cars of freight or two cars of freight,—ordinary cars, equal the weight of this engine and tender, Mr. Mars?

A. It would take five or six cars.

Q. Five or six?

A. Yes sir. Loaded cars.

Q. Well, would it take ten?

A. That would be plenty.

Q. So that if you had a train of 60 to 80 cars,—loaded cars, you would have then a brake appliance on your engine and
580 tender that would have six times the demand upon it, that there was if there wasn't anything but an engine and a tender?

A. Yes sir, ten times. Because that is over capacity, and as far as that is concerned, that would leave quite a volume of over capacity there, in order to guard against any leakages.

Q. The demand upon that air chamber,—the construction of that air chamber, is sufficient to take care of the maximum demand upon it by the whole train?

A. Yes sir.

Mr. Hoagland: The plaintiff objects to that question as leading, and repeatedly answered.

The Court: He has already answered it. Overruled. Exception.

12 o'clock Noon, October 21st, 1913, court adjourned until 2 o'clock P. M. same day.

581 2 o'clock P. M. October 21st, 1913. Court met pursuant to the noon adjournment, and the following proceedings were had and done.

J. O. Mars, recalled by the defendant, testified as follows, upon examination by Mr. Strode:

Q. Now on this engine 213, at the time of this accident, I think you referred to the fact that on that engine was a straight air as well as the automatic?

A. Yes sir.

Q. Now tell the jury, the appliance that is involved in the use of straight air, on the brakes on this engine,—and what you mean by straight air, as distinguished from automatic?

A. The straight air, as the name implies, is straight air, direct from the main drum, through a small straight air valve directly into the brake cylinders. The straight air is taken right out of the top of this perpendicular drum here, and connected with a valve right in the cab, and goes from there directly to the brake cylinders.

Q. That air is taken from the upright or perpendicular tank?

A. Yes sir.

Q. At the top of it?

A. Yes sir.

Q. Is that action shown on this blue print, exhibit 14?

A. Yes sir.

Q. Will you indicate to the jury on that b*ule* print, where the straight air pipe enters the air drum, and where it is connected with the air brake cylinders?

A. Here is the connection right at the top of the drum here, and goes up right here to the engineer's brake valve, and directly from there, into here, (indicating), this pipe here, that leads directly to these brake cylinders, in the forward part of the engine.

582 Q. Now what appliance on this engine 213, at the time of this accident, operated the bell on the engine?

A. The autom*m*atic air, from the main drum—taken from the main drum,—or air, rather.

Q. Air taken directly from the main drum and applied to the bell?

A. Right directly to the bell in connection with the pipe.

Q. And where did this pipe, connecting the air from the main drum to the bell,—where was that located on this engine?

A. It was taken right directly off of an inch and a quarter pipe in the cab, right close to the engineers brake valve.

Q. And where did that pipe extend, and where was it on this engine, between the point where it leaves the cab, and the point where it connects the air drum?

A. It extended from the cab, from the air bell ringer valve, underneath the lagging, and underneath the jacket of the engine. Right at the edge of the cab here, and it continues under the jacket until it reaches very *very* near to the bell,—there is about fourteen or fifteen inches there that goes up to the bell.

Q. What is this lagging that you speak of?

A. That is the asbestos lagging for the boiler, to concentrate the heat to the boiler.

Q. Well is it a covering around the boiler?

A. Yes sir.

Q. And how thick a covering?

A. It varies from an inch and a half to two inches.

Q. And then does,—then outside of that, what is there in addition to that?

A. There is an iron jacket.

Q. And this pipe connecting the air with the bell was under the lagging of the jacket?

A. Under the lagging next to the boiler.

Q. Is the boiler at this point, along this pipe, when the engine is in service,—is it hot or cold?

583 A. Very hot, you can't lay your hand on the boiler at all.

Q. If the air was working on this engine, and the air was set, that is, the air was applied to the brakes, in order to stop the engine, could the brake appliance,—that is the pipes transmitting this air power to the brake, be removed without releasing the brakes?

A. No sir, not with anything, unless you took a crow bar, or an ax- or something so that you could get it out. You could not possibly disconnect them without releasing the brakes.

Q. Could the brakes on this engine be set with the use of the air, if any part, or portion of the appliance was frozen?

A. No sir.

Q. That is, I mean, if the air pump was frozen, or any part of the necessary appliance, in order to apply that air?

A. When would the air be frozen,——

Q. I don't mean the air?

A. Well the pump being frozen,——

Q. Well, assume any part of the appliance was frozen, could the air brakes be set, if the cylinders that apply the air pressure to the brake,—at the wheel,—if those cylinders were frozen on the outside or on the inside, if they could be frozen on the inside, could the air be applied to those brakes, so that the brakes would apply to the wheel,—if that condition existed?

A. No sir.

Q. Would there be any middle ground there where if the air,—if these cylinders, at the brake in the air chamber there, at the brake,—applying the power directly to the brake on the wheel,—would there be any middle ground where they would be partially frozen or partially interfer-ed with or would they have to be one thing or the other?

A. They would have to be one thing or the other.

Q. And would have to operate completely or not at all?

A. Yes sir.

584 Cross-examination.

By Mr. Rose:

Q. Then if there was a condition of ice about the piston which made it necessaty to apply a torch to thaw it out, you sould say that the air braking apparatus must be totally out of condition?

A. It necessarily would not be the air. It would be the points that connected to that. You mean the levers and the stuff like that, that you put up onto the wheel, that is what you mean, as I understand it?

Q. This piston moves in a cylinder, doesn't it?

A. Yes sir.

Q. Suppose ice had gotton about it and frozen on it, on a cold day, in a driving wind with a temperature of fifteen degrees below zero, so that it became necessary for the engineer, in order to make the brakes work, to get a supply of waste, and saturate it with engine

oil, and put that on a scoop shovel and make a fire of it, and thaw the ice off the piston, would you say that that condition would indicate that that particular valve or piston was totally disqualified for work?

A. Yes sir.

By Mr. Strode:

Q. Could that condition of ice freezing on the end of the piston, occur at any time during the time the engine was in use?

A. No sir, I do not think it could sir.

Mr. Rose: That is all.

Witness excused.

585 Mr. FRANK W. STEWART, recalled by the defendant, testified as follows upon examination:

By Mr. Strode:

Q. Mr. Stewart, I am not sure, whether I understood you correctly or not, but I want to get the record plain on it. How far is it from Cheyenne to Sidney?

A. 102 miles.

Q. How long does it take you to make the run from Cheyenne to Sidney, with your freight train?

A. Well there is a difference of times.

Q. Well, about how long?

A. Six or eight hours, or ten hours, sometimes.

Q. Well I understood in your examination this morning,—I understood you to sy that you left Cheyenne on the 30th day of December?

A. Well, I probably did made that statement, but I did not think about December having 31 days.

Q. Well then, when did you leave Cheyenne with reference to the morning of this accident?

A. I left there the night of the 31st.

Q. And what time in the night?

A. Between nine and ten o'clock sometime.

Q. So you were on the road there from nine or ten o'clock in the night, until what time in the morning?

A. 5:40.

Q. There is some little question as to whether you said that the pump on this engine was a Westinghouse pump?

Mr. Rose: No, he said it was a New York pump.

Q. What kind of an air pumpp was on this engine?

A. New York.

Q. And what number, do you remember?

A. No, I don't remember.

586 Cross-examination.

By Mr. Rose:

Q. Do you know what make of air brake it was,—was it an Westinghouse air brake?
A. The brake valve?
Q. Yes sir?
A. No, it was a New York air brake valve.
Q. Now you spoke of Cheyenne, do you mean Cheyenne, the city in the State of Wyoming?
A. Yes sir.
Q. You had brought this engine in the train service, from Cheyenne, Wyoming, to Sidney, Nebraska, just before it was turned over to the yard foreman?
A. Yes sir.

By Mr. Strode:

Q. You tourned them over to him in good condition, brakes and all?

Mr. Rose: The plaintiff objects to that question as not proper redirect examination, and already conceeded and testified to.
Sustained. Exception.

Witness excused.

Mr. PAUL J. DUPONT, called as a witness on behalf of the defendant, was first duly sworn, and testified as follows upon examination:

587 By Mr. Strode:

Q. What is your name?
A. Paul J. Dupont.
Q. Where do you live?
A. Slater, Missouri.
Q. Mr. Dupont, are you the party who has been referred to here in this case, as the Mr. Dupont who was with Mr. Huxoll at the time of his accident?
A. Yes sir.
Q. Were you the fireman for Mr. Huxoll?
A. Yes sir.
Q. Are you in the service of the Union Pacific Railroad at this time?
A. No sir.
Q. Are you in the service of any other road?
A. Yes sir.
Q. What company?
A. The Chicago and Alton.
Q. At what point are you stationed?
A. Slater, Missouri.
Q. When did you quit the service of the Union Pacific?
A. March 24th, 1911.

Q. Do you recall going with Mr.,—leaving the wash house, on the morning that Mr. Huxoll was hurt, with Mr. Huxoll?

A. Yes sir.

Q. Do you recall now about what time in the morning it was that you left the wash house?

A. About 11 o'clock as well as I can remember.

Q. And the wash house that you are referring to in your testimony on the stand, is the wash house that is shown here in Exhibit 4?

A. Yes sir.

Q. What direction did you go after leaving the wash house, you and Mr. Huxoll?

A. South.

588 Q. How far south, or about how far south, did you go?

A. We went south from the wash house to the main line.

Q. Which way did you go from there?

A. East.

Q. In this direction? (Indicating).

A. Yes sir.

Q. Do you recall going past the turn table that morning?

A. Yes sir.

Q. Do you recall where Mr. Huxoll was, and where you were, at about the point where you passed the turn table, that morning?

A. Well, we walked south from that wash house down to the main line, and east,—we started east right there.

Q. East where,—point on the map?

A. From the wash house down to the main line here, and then east,—we started east right there. East in this direction here, and I was on the north side of the main line track.

Q. Well, which side of you was Mr. Huxoll walking on?

A. He was on the right side, and I was on the south side.

Q. Where was you and where was Mr. Huxoll when you reached a point opposite that turn table?

A. I was walking on the north side of the track, and Mr. Huxoll was walking between the tracks eastward there.

Q. Between what tracks?

A. Right down the middle of the main line,—and I was on the south side of the main line.

Q. And where did you go from that point,—east?

A. Yes sir.

Q. Now did you continue in that position, or in what position did you continue from that point towards the east,—going east?

A. I continued eastward from that turntable there to this spot track.

589 Q. This spot track over here?

A. Yes sir.

Q. But what relative position was Mr. Huxoll in with reference to you in walking down along there?

A. He was walking behind me, about 10 or 12 feet, and on the right hand side of me. I was on the north side of the main line,

and he was in the middle of the main line, behind me, about ten or twelve feet.

Q. Were you carrying anything in your hand?

A. Yes sir, I was carrying a grip.

Q. Did you see your engine or engines standing down here by the water crane?

A. No sir.

Q. As you went east, did you hear anything?

A. Yes sir.

Q. What did you hear?

A. I heard a noise that sounded like an engine, coming from some direction, I did not know just where. Whether it was coming from the east or west or where it was coming from.

Q. What kind of a noise?

A. The rumbling noise of an engine.

Q. Did you know,—well what did you do at that point?

A. When I heard it coming I notified Mr. Huxoll that I heard someone coming and warned him to get out of the track as soon as I heard it.

Q. Do you know where you were at that time?

A. At the time I heard this noise?

Q. Yes sir, were you along towards where this engine stood on the spot track?

A. I was west of this engine, on the spot track.

Q. Still west of it?

A. Yes sir.

Q. Now did you hear anything further of this rumbling?

A. I heard a noise and I also heard the bell ringing.

590 Q. Was that at the time or right after that time?

A. It was right at the time I notified Mr. Huxoll.

Q. Now what next happened?

A. The next thing that happened after I heard that noise, this engine came by and it knocked my grip out of my hand?

Q. Which hand?

A. Right hand. And I at once turned around to see if Mr. Huxoll got out of the track, and at that instant I saw this engine 213 knock him down.

Q. Where was he at that time?

A. Between the tracks.

Q. Where was you as regards this engin*g* on the spot track?

A. West of it.

Q. Where was you going?

A. Down to that engine on the spot track, where we always go to see whether it was there or not.

Cross-examination.

By Mr. Rose:

Q. What is your memory of the condition of the weather and storm?

A. It was rather cold that morning, and the wind was also blowing.

Q. When you say it was rather cold, how cold would you say it was?

A. I should judge it was ten degrees below zero.

Q. Or more?

A. Ten or twelve, probably.

Q. And when you say the wind was pretty strong, was it what you would call a gale?

A. No, I would not term it as a gale, although it was blowing some.

Q. You would say there wasn't much wind would you?

A. I would say there was a wind, but it wasn't a gale of a wind.

591 Q. From the time you began to lead the way ahead of Huxoll, along the main track, until your course was interrupted by the sound of an engine, you could not say what you had said to Mr. Huxoll; had you carried on any conversation?

A. None whatever, no sir.

Q. Had you, during any portion of that course eastward turned your head about to look for Huxoll?

A. Yes sir, I had turned around.

Q. Where?

A. I turned around shortly after we started east from the turntable, knowing that he was in the main line, I turned around and saw that he was.

Q. You have a distinct recollection of that, have you?

A. Yes sir.

Q. Did you testify by deposition in this case, on behalf of the Union Pacific Railroad at the office building of the Union Pacific railroad in Omaha, on the 26th day of last February?

A. Yes sir.

Q. Do you recall that Mr. Pettis conducted your examination on behalf of the railroad, and Mr. Hoagland on the part of Mrs. Huxoll?

A. Yes sir.

Q. Was there a storm on that morning, of such violence as to prevent your seeing?

A. No sir.

Q. I will ask you if upon that occasion, referring to that particular trip, from the time you reached the line of the main line track, until the time of the accident, Mr. Hoagland, on cross examination,—Mr. Hoagland, didn't put to you this question, "Did you turn around several times?" and didn't you answer that question, "No sir."

A. No sir, I did not.

Q. The examination wasn't had, and that answer wasn't given?

592 A. I do not remember of making any such answer.

Q. Then was that followed by this question, "Did you turn around any from the time you started east, until the time the engine came by?" and did you not to that question answer, "No sir."

A. I answered, "No sir."

Q. That you didn't turn around,—"Did you turn around any from the time you started east until the time the engine came by, and did you not to that question, answer, "No sir."

A. No sir, I didn't.

Q. And didn't the next question follow: "Now when was it that you first turned around after you went east from the turn table?" and did you not to that question, answer "After engine number 213 knocked my grip out of my hand?"

A. Yes sir, I did.

Q. And wasn't the next question asked, "Are you sure it was after you lost the grip?" and didn't you to that question, answer, "Yes sir."

A. I do not remember what answer I gave to the next question.

Q. As a matter of fact your collision with the engine tender came within an instant after you spoke to Huxoll, didn't it?

A. Yes sir.

Q. And when you looked to see Huxoll, you found him endeavoring or trying to get out from between the tracks, in answer to your warning?

A. Yes sir.

Q. Do you say now that he had had time to move after you spoke to him?

A. I think probably that he had, yes sir.

Q. But you hadn't time to move?

A. It wasn't necessary for me to move.

Q. Well you didn't seem to have any clearance space when the tender of the engine ran into you?

A. I got by didn't I? It didn't hurt me. It knocked my grip out of my hand, but it didn't hurt me.

593 Q. That was plenty for you?

A. Yes sir.

Q. And you didn't feel that you were in any hazard at all, when the engine hit the grip?

A. I felt I was, yes sir.

Q. Well, would you deliberately have allowed the engine to hit your grip, if you had had time to get out of the way?

A. Not if I had seen them coming, I would not.

Q. Then the fact is, that you yourself, were surprised or you would not have collided with the engine tender?

A. Certainly I was surprised.

Q. Well did it occur to you that Mr. Huxoll might have had the same surprise, if he had to get this warning from you?

A. Well understand that he got this warning from me at the same time,—I want you to understand that I warned him before the engine struck my grip.

Q. Well but you do say that the striking of your grip, and your calling to Fred were almost instantaneous, weren't they?

A. No, I said that I called his attention to the noise that I heard, before the engine struck me.

Q. But you also said that the engine struck you an instant after-

wards; in cross examination you told that to me, now I want to know?

Mr. Strode: The defendant objects to the question as assuming something that the witness didn't say. I think he has confused the witness. (No ruling.)

Q. What did you say to Fred when you say you warned him,—what did you say to him?

A. I told him to get out of the way, as I heard something coming.

Q. Wasn't all that you said, "Fred I believe I hear something coming," isn't that what you told him?

A. I said, get out of the way Fred, as I hear something coming.

Q. Well, isn't what you said, "Fred, I hear something coming."

594 A. I think I said "Fred, get out of the way, I hear something coming."

Q. Well, didn't you say just, that you heard something coming?

A. No sir, I do not think I did.

Q. Did you so testify at the occasion of the taking your deposition last February?

A. I do not remember whether or not I did.

Q. Then isn't it a fact that in an instant after you spoke the tender struck your grip in your hand?

A. Well, it wasn't a great while after I spoke.

Q. Just answer directly, whether or not it was?

A. It was just an instant, yes sir.

Q. Isn't it a fact that while you were proceeding east, that it was both snowing and blowing?

A. Yes sir.

Q. And that there was two inches of snow covering the ground?

A. I could not say as to just how much snow was on the ground.

Q. Could you say approximately?

A. Probably an inch or so, yes sir.

Q. How close were you to the water crane, when you were struck?

A. About twenty-five or thirty feet, I should judge. I never measured the distance, I do not know exactly.

Q. What is your observation at this time, twenty-five or thirty feet?

A. I should judge it was that far, it may be further than that I am not sure.

Q. Didn't you, at the taking of the deposition to which I have referred, testify that you were about ten feet west of the water crane?

A. I do not remember whether or not I did.

Q. What is your best judgment,—what in your best judgment was the speed of this engine that struck you?

Mr. Strode: The defendant objects to that question as improper cross examination. We didn't ask anything about this in the

595 cross examination. We just asked him to indicate to us about where this man got onto the track, and where he was on the main track, and where he was hit.

The Court: Didn't you bring out the fact that he gave Mr. Huxoll warning?

Mr. Strode: We brought out the fact that he heard an engine coming, and heard the rumbling, and heard the bell, and spoke to Mr. Huxoll, but we didn't ask anything about how long it was between the warning, and the time he was run over. If counsel will permit this to be put in this record, that their purpose is to get into this record the time between the time of the warning, and the time it struck Mr. Huxoll, I will let that go in.

Mr. Rose: Of course I don't know why there is such an objection to stop my questions of this witness. But counsel has a right to do it, and I have no right to comment on that. But here is a situation testified to by this witness that involves the very transaction of this action. They have put this witness upon the stand and attempt to proceed in the course from the wash house, to the very time when Fred Huxoll is stricken, fatally under this engine. Now that is the very transaction that is the subject of inquiry. When counsel puts this witness on the stand, and takes him over that sensitive ground, he opens up this witness's part with *with* that transacion, so that we have a right to go into it and test by the whole transaction, the credibility of his statements in respect to fragmentary parts. The rule is just the same, if you put in a part of his transaction, we can bring it all in. It goes to the credibility of the witness. The point that he addresses himself to is as to whether this accident occurred through any fault of the defendant company, and he goes
596 with this witness directly to the very transaction itself.

Suppose he omits a vital transaction of that kind in chief, can he restrict the inquiry and say, we didn't want to get what this witness knew about that. And absolutely block all inquiry? It is absolutely within the discretion of this court how far this cross examination may go when it is directed to the incidents that constitute a part of the transaction. That is called res gestae, as far as this transaction is concerned. Counsel has not asked about that, but he doubtless wants to give the inference that it was the bell on 213 that rang. Now there will be questions put about what this witness did, and whether or not when he was right in connection with this accident, that he heard this bell ring. Those incidents will be tested by little circumstances. The purpose of cross examination is to permit us to get at these things in detail, to ask about incidents that will test the witness' recollection or his credibility. Now then, it is testified further by this witness, that he notified Mr. Huxoll that he heard something coming, and about the position of Huxoll when he saw him, and now we propose to show by this witness the speed of this engine, and we propose to show by other circumstances that the bell to which this witness has referred was not ringing on engine 213, and that the whistle didn't blow. Now in order to test out those questions, we want a fair liberality of inquiry into the situation here, and as long as we confine ourselves to this witness' part in the occurrences there, and to what he did in the transaction, and when the transaction was on, and it became a part of it, and the things that were

spontaneous, and his observation there at that time, and his distance from the water crane, and all those things it is absolutely
597 essential in the interests of justice if we want to get at what this witness' statements in chief would amount to. I have made those observations that I did not want to be restricted so fine in this case, that we can't have an opportunity on cross examination to test the credibility of this witness on some isolated item that counsel has sought to bring out. We are not going to seek original evidence from this witness. It is not our purpose to introduce this witness as our own in order to test his credibility, nor to seek to get from him original evidence. We desire a fair scope in the line of inquiries, that will test his recollection, and the purpose of that is to test the credibility of the witness and the accuracy of his statements and recollection and observation as to the points which he testified to in favor of the plaintiff.

The Court: Objection having been made by defendants to the last question, and plaintiffs having stated in the record, that the question, is put for the purpose of testing the credibility of the witness, objection overruled. Exception.

Q. Now Mr. Dupont, in your observations of that engine at the time it struck you, and knocked your grip from your hand, what would you say in your best judgment, as to the speed it was running?

Mr. Strode: The defendant objects to that question as improper cross examination, and the subject matter was not gone into in chief, and no evidence given on that subject.

Overruled. Exception.

A. I should judge it was running between four to six miles an hour.

Q. Weren't you knocked down when the satchel was knocked out of your hand?

Mr. Strode: The defendant objects to that question as im-
598 proper cross examination, and the subject matter was not gone into in chief, and no evidence given on that subject.

Overruled. Exception.

A. No sir.

Q. You weren't, you say?

Mr. Strode: The defendant objects to that question as improper cross examination, and the subject matter was not gone into in chief, and no evidence given on that subject.

Overruled. Exception.

A. No sir.

Q. Was your attention arrested to your own predicament at all?

A. Yes sir.

Q. And how long did it take for the rear end of the tender to pass by you?

A. Just an instant, a minute or so.

Q. Do you think it took a minute for the end of the engine to go by you after it hit you?

A. I could not say how long, it just took an instant.

Q. By the time you got squared around, you could not see the track at the leading end of the engine. If you were that close to it, by the time you got yourself squared around?

A. Which end do you call the leading end?

Q. The end that struck you?

A. I could not see that after I turned around.

Q. Now you were meeting that engine?

A. Yes sir.

Q. And you didn't see it until it struck you.

A. No sir.

Q. How did you explain the fact that you didn't see it, when you were facing it, and walking towards it?

A. I wasn't looking for it.

Q. Was there any other reason?

A. There was a bad wind and storm there that I wasn't able to see.

599 Q. And also, your attention had been drawn to it so that you had hollered to Fred, hadn't you?

A. Yes sir.

Q. Well, after your attention had been drawn to it, would you not be looking for it yourself, if you tried to give Fred warning?

A. Well, I looked for it, but I was in the clear myself, or I thought I was.

Q. Well, you didn't know where it was?

A. No sir.

Q. Well, you didn't think you were running with your nose into the tender, or with your grip exposed out where it might be knocked out of your hand, when you were hollering to Fred?

A. No sir.

Q. Do you have any recollection as to the ground around the water tank there?

Mr. Strode: The defendant objects to that question as improper cross examination.

Sustained. Exception.

Q. I just want to know if you have any recollection of the condition of the ground at and very near the place where the tender struck you?

A. Yes sir.

Q. What is your recollection as to the condition?

A. My recollection is there was a little snow on the ground and it was very cold there that morning, and there wasn't so much snow that it covered the rails, you could see the rails all right.

Q. In that storm you followed the line of the rail, because it was dark against the white gank of snow?

A. No sir, I got on the outside of the rail.

Q. Well, you followed along the line of it.

A. Well I did not pay any attention to the rail, after I got out of the main line.

Q. Was that the usual way you went to reach the engine on the spot track?

A. No sir, not always.

Q. Was that the usual way, I asked you?

A. It was the usual course I took, yes sir.

Q. I will ask you if it was not a fact that there wasn't just
600 a sheet of ice, so that it was all frozen up with ice around that water crane, and it that wasn't the condition at the point where the ice engine hit you?

Mr. Strode: The defendant objects to that question as incompetent, and improper cross examination, and misconduct on the part of counsel, and the question is improper cross examination.

Sustained. Exception.

Q. What was the first movement you made after the tender of the engine knocked your grip out from your hand?

A. I at once turned around to see if Fred had got out of the track.

Q. Well, after you turned around, the tender had passed by so that you could not see Fred any more, if he was between the rails.

A. I saw Fred yes sir,—I saw him get hit.

Q. Well you saw him before the engine got by you?

Q. Yes sir.

Q. Well, what was the first thing that you did,—what was the first movement you made away from that point,—and what did you do?

A. After he was struck?

Q. Yes sir.

A. I got on the step of the engine.

Q. And did you mount the engine while it was in motion?

A. It was just about stopped when I got on the engine.

Q. Wasn't there steam still applied when you got on the engine?

A. No sir, I do not think so.

Q. Didn't you give Zimmer the signal to stop?

A. I hollered at him and told him to stop, yes sir, but before I did that, I think he was stopping already.

Q. Now when you boarded the engine, you didn't hear any bell ringing, did you?

A. Sir?

Q. Before,—when you boarded the engine you didn't hear any bell ringing, did you?

601 A. No sir.

Q. Or you would not say now that the bell on engine 213 was ringing, would you?

A. I do not know that it was, but I do not know it was not. I know I heard a bell, but I do not know whether or not it was on 213, or 219 or some other engine.

Q. Well, after you got on the engine and told Zimmer to stop how far did the engine move then, before it came to a rest.

A. It just moved a short distance.

Q. Well, didn't it move an engine length?

A. No sir, I do not think it did.

Q. I will ask you if on the taking of your deposition to which ref-

erence has been made, this question wasn't asked you, "Now, when he stopped the engine, how far did it go after you told him this, before the engine stopped?" and to that question, didn't you answer, "About an engine length."?

Mr. Strode: The defendant objects to that question as not an impeaching question, and not the question propounded to the witness, for which this is sought to be used as an impeachment.

(Question withdrawn.)

Q. Now were the following questions and answers given by you in that deposition, beginning at page 26. "Now where was it that you got on this engine?" "I got on the north side of the engine, on the step of the engine." Q. "On the step going into the gangway, where the engineer was?" A. "Yes sir." Q. "Who did you see?" A. "I saw the engineer." Q. "Who first spoke?" A. "I did." Q. "What did you say?" A. "I told him to stop at once. He had run over my engineer Mr. Huxoll." Q. "What did he say?" A. "He made no reply but he immediately stopped." A. "What did he do to stop?" A. "He applied the automatic air to the engine". Then I will omit down to the question which I last asked you. Q. "Now, when he stopped the engine, how far did it go after you told him this, before the engine stopped?"?

602 Mr. Strode: The defendant objects to that question as improper cross examination, incompetent, and seeking to impeach on a matter not inquired into, on direct examination.

Overruled. Exception.

A. I don't remember what answer I gave to that question.

A. Did you answer any of those questions?

Mr. Strode: The defendant objects to that question as improper cross examination, incompetent, and seeking to impeach on a matter not inquired into on direct examination.

Overruled. Exception.

A. Yes sir.

Q. You recall generally that you claimed in taking that deposition, that you are the one who boarded the engine in motion, and told the engineer Zimmer to stop?

A. Yes sir.

Q. Isn't it true that you gave as a reason for saying that the engine wasn't going over more than four to six miles an hour that you could not have boarded it as quickly as you did, if it had been going at a high rate of speed?

Mr. Strode: The defendant objects to that question as improper cross examination, incompetent, and inquiring about a subject not inquired into on direct examination, and inquiring about a subject to which an objection has already been sustained.

Sustained. Exception.

Q. Now isn't it a fact, that when you and Mr. Huxoll started east-

ward, from a point south of the turn table, you both walked parallel with the main line track?

A. Yes sir.

Q. Isn't it a fact that you had not proceed- more than five feet after you first heard the rumbling noise which afterwards proved the engine,—proved to be the engine,—that the tender of the engine struck you and knocked you down and the satchel out of your hand?

603 A. I was about ten feet ahead.

Q. No, after you first heard the rumbling noise, you had not advanced more than five feet until the satchel was knocked out of your hand?

A. Yes sir, I advanced more than that.

Q. Now as a matter of fact, wouldn't you say that that engine was going twelve to fifteen miles an hour?

Mr. Strode: The defendant objects to that question as improper cross examination, and for the reason that the same question has been asked and objection been sustained twice before.

Sustained. Exception.

Q. Isn't it a fact that the engine wasn't shut off until you notified the engineer?

A. I could not say whether or not it was.

Q. I will hand you exhibit 15, and call your attention to the name Paul J. Dupont, on the first page; Paul Jackson Dupont on the second page; Paul J. Dupont on the third page; Paul J. Dupont on the fourth page; Paul J. Dupont on the sixth page, and Paul J. Dupont on the seventh page, and I will ask you if you know in whose hand writing those names appear there as signatures at the bottom of each page?

A. Yes sir.

Q. And whose signature is it?

A. Mine.

Q. And where did you sigh that statement?

A. Kansas City.

Q. Do you remember on or about what date?

A. In July sometime, about the tenth or twelfth. The 12th I think, 1912.

Q. Was Month J. Pruitt present when you signed it?

A. I think he was, yes sir.

Mr. Rose: Now as a part of the cross examination of this witness, I desire to offer some statements that appear in this written statement, and I will offer the whole written statement.

604 Mr. Strode: The defendant objects to the offer as incompetent, and immaterial, and improper cross examination, and for the reason that it contains a statement upon subject matters not inquired into on direct examination, and not a part of the examination of this witness on the part of the defendant, and for the further reason that it contains no statements upon the subject matter inquired into on the part of the defendant, that would in

any way contradict his statements on direct examination, or on cross examination, upon such matter.

Mr. Rose: I do not know as I want to press the whole of it, in view of the course of the examination. I want to read enough of it to show that it refers to the accident in question to identify it.

The Court: If he introduces the whole exhibit, he has a right to introduce any portion that he sees fit.

Mr. Rose. Now I will offer in evidence the portion of it between the brackets "1" which gives the weather conditions, which he has tried to modify.

Mr. Strode: Mark out all of it that you intend to offer.

Mr. Rose: All right.

Q. I will ask you if the wind at the time of this accident was not blowing smoke and steam from the smoke stacks and steam pipes of the round house, so that the smoke and steam lay so close to the ground that it formed a fog, and that you weren't able to see more than 12 to fifteen feet ahead of you at that time?

Mr. Strode: The defendant objects to that question as improper cross examination.

Overruled. Exception.

A. Yes sir.

Mr. Rose: Now your honor, we offer in evidence as a part of the cross examination of this witness portions of the statement referred to, of Exhibit number 15, bearing the signatures
605 of the witness indicated by, and enclosed in brackets. Indicated by numbers one to thirteen, consecutively. Without making an offer of each separate statement separately.

Mr. Strode: We object to that portion of the exhibit within the brackets, numbered "1" for the reason there is nothing on this portion of the exhibit that in any way contradicts anything that the witness has said, in his testimony here upon the cross examination or direct examination.

Overruled. Exception.

Received in evidence and read to the court and jury as follows: "I remember the accident, which resulted in the death of Fred Huxoll, that happened on or about January first, nineteen hundred and eleven, near the water tank in the round house yards of the Union Pacific Railway at Sidney, Nebraska. This accident happened about 11:15 A. M. of January 1, 1911. At this time there was a high wind ladened with snow, coming from the northwest and blowing to the south east." The original exhibit 15 is hereto attached and made a part of this record.

Mr. Strode: The defendant objects to that portion of the exhibit within the brackets numbered two, for the reason that there is nothing in this portion of the Exhibit that in any way tends to impeach any statement of the witness. We objected to the matter on the subject matter involved in this when they sought to examine

the witness, and the court sustained the objection. And we object to that as improper cross examination.

Sustained. Exception.

The Court. I will admit the testimony touching upon the incident and bearing upon the striking of the satchel of the witness, and striking of the deceased and the part this witness took and what he did immediately afterwards. And the cours- they took from the wash house.

Mr. Strode: I think that three probably relates to some
606 matters that have been inquired about, and I think there is no objection to three.

Number Three received in evidence and read to the court and jury as follows: "Just a few moments prior to this accident, the deceased Fred Huxoll and myself started from the wash room, a small building about fifteen or twenty yards west of the above mentioned round house, and started out in a south easterly direction, passing along side the turn-table at the round house and continuing in a south easterly direction toward our engine which stood facing east on the out bound track about ten yards east of the aforesaid water crane. This outbound track extending from the water crane to its eastern extremity was parallel with the main line track running east and west, but this outbound track extending west from the water crane diverging to the northwest to the northwest extremity at the turn table. The deceased and myself continued in this southeasterly direction, until we neared the main track at a point about ten yards west from the above mentioned water crane."

Mr. Strode: No objection to "4".

Number Four read to the court and jury as follows: "At this point, with Fred Huxoll about ten feet behind me, we began walking in an easterly direction toward our engine, and parallel with the main line track. I did not see Fred Huxoll step in between the rails on the main line track, but in turning around looking for Huxoll I saw him walking up the track between the rails."

Mr. Strode: No objection to "5".

Number Five received in evidence and read to the court and jury as follows:

"At this time I was about two feet north of the main line track, and walking east to my engine, I being about thirty feet west of the water crane at this time, walking east toward the water crane, when I had advanced about ten feet from this last described point I heard the rumble and panting of an engine, but could not tell in which direction it was coming from or upon what track.
607 but I immediately turned toward the deceased Fred Huxoll, still continuuing my walk east, and hallowed to Fred Huxoll, "Get out of the track, Fred, as I hear something coming," I had not advanced more than five feet from the place where I first heard the noise of the approaching engine, until it struck and

knocked out of my hand, my hand bag which I was carrying in my right hand."

Mr. Strode: The defendant objects to the portion number "6" for the reason it in no way contradicts anything that the witness has said upon cross examination or direct examination, or in any way impeaching the evidence.

Overruled. Exception.

Number Six received in evidence and read to the court and the jury as follows:

"Just at this instant I turned around toward Huxoll and saw this same engine strike and knock down Fred Huxoll, Fred Huxoll at the same time attempting to get out of the track toward the north."

Mr. Strode. Let the record show that there is no number seven opposite one of the brackets in this exhibit.

Mr. Strode: The defendant objects to the offer of the portion number "8" as incompetent, and not cross examination, and not in any way contradicting any testimony of this witness on direct examination, or cross examination. And relating to a subject matter not proper to be admitted upon cross examination, and which was excluded upon objection by counsel for the defendant upon the cross examination. It relates to a subject matter not within the scope of cross examination of the witness, or the direct examination of this witness, and incompetent, and we particularly object for the reason that the statement does not contradict any statement made on the direct examination.

Sustained. Exception.

This portion Number 8, to which objection has been sustained is found in the original exhibit which is hereto attached,
608 and numbered Exhibit 15.

Mr. Strode: The defendant objects to the offer of the portion number 9, for the reason that the subject matter in this offer does not tend to contradict any statement made by the witness on direct examination, and is not proper to be offered in impeachment of anything said by the witness on the direct examination.

Overruled. Exception.

Received in evidence and read to the court and jury as follows: "As the tank hit Huxoll I immediately jumped on the step at the cab of the engine, on the fireman's side, of engine 213, and *hollowed* at the engineer, and told him to stop at once as he had run over my engineer. He did stop in about an engine's length or a little farther."

Mr. Strode: The defendant objects to the offer of the portion numbered "10" for the reason that it does not impeach or tend to impeach anything said by the witness on direct examination, and is not a proper impeaching question, and for the reason that it does not impeach or tend to impeach anything said by the witness

upon cross examination, with reference to the subject matter involved in the offer?

Overruled. Exception.

Received in evidence and read to the court and the jury as follows: "This engine had no cars attached to it, and no one in charge of it but the engineer and fireman. This engine 213 gave out no warnings in the way of a whistle or ringing of the bell, although there was a bell ringing. I do not know for sure on what engine it was—it might have been on one of the engines on the outbound track."

Mr. Strode: The defendant objects to that portion in number 11, as being upon a subject matter not included or covered by, or within the scope of the direct examination, and not a subject of impeachment or answers illicited upon cross examination of the subject matter not covered upon the direct examination.

609 Overruled. Exception.

Received in evidence and read to the court and the jury as follows: "The engineer did not shut off his engine until I notified him of the accident—Huxoll having been hit and knocked under the engine at this time."

Mr. Strode: The defendant objects to that portion numbered "12" as not contradicting anything that the witness has said upon direct examination, or cross examination, and incompetent.

Overruled. Exception.

Received in evidence and read to the court and jury as follows: "The route Huxoll and I used in approaching our engine was the usual way, although it was possible for us to have gone on the north side of the turn table and gone on between the water crane and coal chutes, but this way was as dangerous, if not more so than the regular and usual route which we were using."

Mr. Strode: No objection to portion No. 13.

Received in evidence and read to the court and jury as follows: "I have read the above statement on seven pages, and it is true and correct as to the best of my recollection and belief."

Q. Mr. Dupont, you met Fred Huxoll's widow at her house shortly after the accident, did you?

A. Yes sir.

Q. I will ask you if at that meeting Mrs. Huxoll asked where you and Fred were at the time of the accident, and how it happened that he was struck, and if in that conversation, and in answer to that question you did not say to her, "We were coming from the wash house, walking to get to our engines. The weather was very bad, steam and snow blowing. We were trying to find the best way there."

Mr. Strode: The defendant objects to that question as improper cross examination, and seeking to impeach the witness upon

610 a proposition that has not been inquired into on direct examination.

Overruled. Exception.

A. Yes sir.

Q. And did you in that conversation, in answer to an inquiry by Mrs. Huxoll, as to how the accident happened, and how it happened that you were only knocked down, and Fred had to be caught, when you were walking together, say, in substance: "That we started from the wash house, he was from ten to fifteen feet back of me; while I was walking I thought I heard the noise like an engine coming and I yelled to Fred, "I hear something" and just then I was knocked down and my grip was knocked out of my hand, and I got up as quick as possible, and started back to see where Fred was. I could not see him and yelled to the engineer to stop, for I knew then he had been struck." Did you say that to Mrs. Huxoll?

A. Part of it I said, and part of it I did not say.

Q. What part didn't you say?

A. I think she is mistaken when I told her I was knocked down because I wasn't.

Q. Did you say all the rest of it?

A. Yes sir.

Q. Did you tell her you could not see Fred?

A. I do not remember whether or not I did.

Q. You would not say whether or not you did tell her that?

A. No sir.

Q. You knew Mr. Tramp, Fred Huxoll"s uncle in North Platte, too, didn't you?

A. Yes sir.

Q. And did you call in his store on account of the death of his nephew to see him, shortly after the accident?

A. Yes sir.

Q. Did he ask you how it happened?

611 A. I do not remember whether or not he did.

Q. Did you, in answer to a question of Mr. Tramp, as to how it happened that Fred got run over, say in substance, "Well, we started together from the wash house and started to walk to our engine. We were called to go to Perdu light" And in answer to further questioning, as to how it happened, that you and Fred started together, and you weren't hurt, and as to where Fred was, with reference to where you were at the time say, "Well, Mr. Tramp, I don't know, there was such a storm you could not see your hand before your face."

Mr. Strode: The defendant objects to that question as no proper foundation laid, and incompetent.

Overruled. Exception.

A. I do not remember whether or not I answered those questions that way or not.

Q. You say now that you could not say whether you told Mr. Tramp that there was such a strom that you could not see your hand before your face, or not?

Mr. Strode: The defendant objects to that question as no proper foundation laid, and incompetent.

Overruled. Exception.

A. I do not remember whether or not I told him.

Q. Well, do you recall that in that conversation Mr. Tramp, asked you where Fred was, with reference to the position you were in?

Mr. Strode: The defendant objects to that as not a proper impeaching question.

Overruled. Exception.

A. No sir, I do not recall that.

Q. Do you recall your saying in answer to such a question that you did not know where Fred was?

612 Mr. Strode: The defendant objects to that question as not a proper impeaching question.

Overruled. Exception.

A. No sir.

Q. You don't recall saying in the same connection that there was such a storm blowing that you could not see your hand before your face?

Mr. Strode: The defendant objects to that question as not a proper impeaching question.

Overruled. Exception.

A. No sir, I do not remember.

Q. Do you remember of Mr. Tramp inquiring as to whether you heard the engine coming, and whether you answered,—would you say whether you answered that question, "I thought I heard something, and called to Fred, and said to Fred, "Look out, I hear something" but about the same time I was struck, and knocked down and when I gathered up my grip Fred was run over" or that in substance?

A. No sir.

Q. Do you say you didn't say that, or that in substance?

A. No sir. Not at that time.

Q. Did you at any time say that to Mr. Tramp?

A. Yes sir.

Q. When?

A. I stated to Fred, Mr. Huxoll,—to Mr. Huxoll,—to look out there was something coming.

Q. Well, did you tell Mr. Tramp that you had so told Fred?

A. I do not remember whether or not I told him, or

613 whether or not I didn't.

Q. Did you say to Mr. Tramp that at the time you said that to Fred that you were struck and knocked down, and that when you gathered up your grip, Fred had been run over, or that in substance?

A. Yes sir.

Q. You think you said that to Mr. Tramp?

A. Yes sir.

By Mr. Strode:

Q. Did you understand in the last question that Mr. Rose read to you that you said you were knocked down, to Mr. Tramp?

A. No sir, I did not understand it that way at all. I understood him to say that Mr. Huxoll was knocked down.
Q. Did you tell Mr. Tramp that you were struck and knocked down?
A. No sir, I did not.
Q. Well, you weren't, that is the reason you told him that?
A. No sir.
Q. Was your engine facing east?
A. No sir, it was facing west.
Q. Was the wind blowing from the north east.
A. Yes sir.
Q. From the north east?
A. From the north.
Q. North east?
A. North east, yes sir.
Q. I am trying to find out whether or not it was blowing from the northeast or northwest?
A. Well, I do not remember whether or not it was blowing from the north east or north west, exactly.

Witness excused.

5 o'clock P. M. October 21st, 1913, court adjourned until 9:30 A. M. the next day, October 22nd, 1913.

614 9:30 A. M. October 22nd, 1913. Court met pursuant to adjournment, and the following proceedings were had and done.

L. E. JOHNSTON, called as a witness on behalf of the defendant was first duly sworn and testified as follows upon examination by Mr. Strode:

Q. What is your name?
A. L. E. Johnston.
Q. Where do you live?
A. Omaha.

Mr. Strode: Let the record show, that it is stipulated and agreed that at the time of the accident Mr. Huxoll was carrying a little hand grip.

Q. Are you in any way related to Mr. Johnston the road master of the Union Pacific?
A. No sir.
Q. Are you in the service of the Union Pacific, and were you in January, 1911?
A. Yes sir.
Q. How long have you been in the service of the Union Pacific Railroad Company?
A. Since the 15th of June, 1910.
Q. Where was you stationed, and were you stationed, in January, 1911?

A. Headquarters at North Platte, for the territory between North Platte and Cheyenne, and at the present time, I am in Omaha.

Q. What were your duties, in what capacity were you employed in January 1911? And prior to that time?

A. Investigating accidents and settling claims for the Union Pacific.

Q. What were your duties along that line in January 1911
615 and prior?

A. Well I was investigating accidents and the causes of accidents, and as to defective equipment or what leads up to accidents and reporting it, and of coure settling claims.

Q. Well was it any part of your duty investigating accidents at the time, to make an inquiry of the employees of the company?

A. Yes sir.

Q. And what employees would you inquire of?

A. Any that were connected with the accident in any way.

Q. Or witnessed the accident?

A. Anyone that knew anything about it.

Q. And what were your duties with respect to such examination—how was it made, and how was it preserved in any way?

A. We take it in the matter of a written statement signed by the party.

Q. And where was those,—in the course of your duty there, what would be done with the written statements that were taken from the employees who witnessed the accident?

A. Forwarded to the claim agent at Omaha.

Q. Now was it a part of your duty, and were you required in the course of your duty to take these statements of the employees of the company, who witnessed the accident?

A. Yes sir.

Q. And forward them to the home office?

A. Yes sir.

Q. Now with reference to this Huxoll accident, where were you when that happened?

A. I was in North Platte.

Q. When did you go to Sidney, with respect to the time the accident happened?

A. I left North Platte, on 17 that evening, and I got to Sidney the next morning,—the morning of January 2nd.

Q. What time did you leave North Platte?

616 A. I do not remember the time, but as I remember the train number 17 was quite a bit late.

Q. Now on the morning of January 2, did you see Charles B. Matthews whose testimony has been read in this case?

A. I saw Charles B. Matthews, I do not know anything about his testimony being read here.

Q. Who was the Charles B. Matthews that you saw and talked to, Mr. Johnsoton?

A. He was a fireman on the engine.

Q. Where did you see him?

A. In Sidney.

Q. At what place, in Sidney?
A. At the Union Pacific Hotel.
Q. Is that the hotel that is shown here on this Exhibit 4?
A. Yes sir.
Q. Do you recall now about what time you saw him there, January 2nd?
A. It was during the forenoon.
Q. Now you may state what you and Mr. Matthews did there, if anything, did at that time? I am not asking for any conversation, but I am asking what you did?

Mr. Comstock: The plaintiff objects to the question as immaterial irrelevant and incompetent, hearsay.
Sustained. Exception.
Mr. Strode: The defendant offers to prove by the witness that at the time a statement was prepared by the witness and Mr. Matthews, with reference to this accident.
Mr. Comstock: The plaintiff objects to the offer for the reason it is immaterial, irrelevant and incompetent, and broader than the question, and seeking to introduce evidence that is not selicited by the question.
The Court: Overruled. I will let him answer the last
617 question. Plaintiff excepts.

Q. (Last question read as follows:) Now you may state what you and Mr. Matthews did there, if anything, did at that time. I am not asking for any conversation, but I am asking what you did?
A. He went up in the room at the hotel there with me, and gave me a statement regarding this accident to Mr. Huxoll.
Q. And what did you do with respect to the statement which he gave you?
A. I wrote it down.
Q. And when did you write it down with respect to when he gave it to you?
A. Right at the time that he gave it.
Q. I will call your attention to Exhibit 7, that has been offered here, in evidence, and I will ask you to examine this exhibit and state what the exhibit is, and what you know about it?

Mr. Comstock: The plaintiff objects to that question as immaterial irrelevant and incompetent, and hearsay.
Mr. Strode: Strike out what he knows about it.
Overruled. Exception.

A. This is the statement, that Mr. Matthews gave me at that time.
Q. That is the statement that you referred to in your testimony?
A. Yes sir.
Q. This exhibit that you have identified here as Exhibit 7 is also identified on the face of the exhibit as Exhibit 6, isn't it?
A. Yes sir.
Q. You may state, Mr. Johnston whether this Exhibit number 7

referred to, upon the former trial as Exhibit 6, whether that exhibit was read by Mr. Matthews before it was signed?

A. Yes sir, it was.

Q. You may state when you got the information, and facts that are set out in that exhibit, and when you got them with
618 respect to the time it was reduced to writing?

A. Mr. Matthews gave me the facts and I reduced it to writing right at the time he gave them to me.

Q. When did you reduce them ro writing with respect to where Mr. Matthews was?

A. He was right in the room with me.

Q. You may state whether that Exhibit correctly and accurately sets out what Mr. Matthews told you at that time and place?

A. It does.

Q. You may state whether Mr. Matthews at that time and place said to you, in referring to the Huxoll accident, that our engine was running through this smoke or fog, not to exceed three to four miles an hour?

A. He did.

Q. You may state whether Mr. Matthews at that time and place said to you, "That an engine was standing at the water crane as we passed?"

A. He did, he said that.

Q. And "That all of a sudden our engine came to a stop, and I was on the north side of the engine, and I looked out to see what was wrong,—I did not know what was wrong,"——

A. Yes sir, he said that.

Q. Did he say to you at that time and place, "When engine 213 stopped, the pilot of it, and engine 1913 were just about opposite each other"?

Mr. Comstock: The plaintiff objects to that question as immaterial irrelevant and incompetent, and there is no dispute about that.

Mr. Strode: If it goes in the record there is no dispute about it, it is all right.

Mr. Comstock: What I mean to say is there is no dispute or controversy, or no foundation laid, to impeach the witness on that proposition.

Mr. Strode: All right, I will not press it, in view of the statement of counsel, that there is no dispute about it.

619 Mr. Hoagland: The statement is in evidence.

Q. Did he say to you at that time and place, and "When taken out from under our engine, Huxoll was about 60 to 75 feet west of the water crane. The bell on our engine was ringing while passing through this fog,—same was operated by automatic bell ringer?"

Mr. Comstock: The plaintiff objects to that question as wholly incompetent and immaterial, and cross examination of his own witness and a mere repetition and he said that this is his statement, and all of it is his statement, and counsel is reading from the cocument

and cross examining his own witness, and the statement having already been in evidence and read to the jury.

Overruled. Exception.

A. Yes sir.

Cross-examination.

By Mr. Comstock:

Q. You lived at North Platte, did you Mr. Johnston, when this accident occurred?

A. Yes sir.

Q. Well you got to this accident before the first of January 1911?

A. I don't understand the question.

Q. You got to this accident before the second of January, 1911, didn't you?

A. No.

Q. Did you take two statements in one day?

A. Oh, yes sir.

Q. How?

A. Yes sir.

Q. Two from Matthews?

A. Not from Matthews, I thought you said, could I take two statements in one day.

620 Q. Didn't you get another statement from Matthews?

A. No sir.

Q. Well, who took his other one?

A. I don't know.

Q. How many claim agents did you have out, two claim agents?

A. Just one.

Q. Who was he?

A. Just myself.

Q. Well, how could,—well you could not cover that whole territory, taking these accident reports?

A. Yes sir.

Q. Didn't you have deputies strung all along the line to do that?

A. What do you mean by accident reports?

A. Just what you said here?

A. Yes sir.

Q. Well, could you tend to that whole performance of this whole division?

A. I was supposed to.

Q. Well did you?

A. Yes sir.

Q. Well, didn't you have deputies all along the line working on the line?

A. No deputies under me whatever.

Q. Well this man that took this other one had no authority then?

Mr. Strode: The defendant objects to that question as asking the witness to construe the rules.

(Question withdrawn.)

Q. Well you make them do you,—you have a special form an you make them for them do you?

A. Make them for them,—for who and for what. I didn't use an forms at all.

Q. You make the statements for the employes?

A. The witness makes or gives the facts and I write then

621 Q. Well, why didn't you send a blank out and say, fi it out?

A. They had blanks for the employees.

Q. Well, that is not sufficient?

A. Well, it is according to the nature of the case.

Q. I see. If it is a serious case, it is not sufficient?

A. We try to get the facts.

Q. Favorable to the railroad.

A. We try to get both sides.

Q. Did you ever make a statement of any employee that i volved the statement of any employee where it said that the be was not ringing?

A. Yes sir.

Q. Well, it is an unusual thing, isn't it?

A. Well, pretty generally the bell is ringing.

Q. Well, how do you know that pretty generally the bell is rin ing?

A. From observation.

Q. Where?

A. Along the railroad.

Q. They are always ringing?

A. No, not always ringing.

Q. Well, pretty generally ringing,—at what places?

A. Dangerous places, crossings and things of that kind.

Q. The rules require the whistle to be blown?

A. Surely.

Q. And the bell to ring?

A. Yes sir.

Q. Well the whistles are pretty generally blown?

A. Well, of course the state law,—in approaching crossings, th are supposed to be generally blown. Of course there are exception cases.

Q. There are exceptional cases?

A. Occasionally they may not whistle at crossings.

Q. Well it is an exception that vi*o*ates the statutes of N

622 braska, isn't it?

A. Well I suppose it would be a vi*o*ation of the statu if an accident occurred, but otherwise it would not be.

Q. Isn't it, when they fail to blow a whistle at a public gra crossing, isn't it the case, that they vi*o*ate the statutes of the Sta of Nebraska?

Mr. Strode: The defendant objects to that question as not prop cross examination.

Sustained. Exception.

Q. But you reduced the statement to writing yourself?

A. Yes sir.

Q. And it was your business to get on the ground and investigate an accident and settle claims?

A. Yes sir.

Q. And you were there representing the Union Pacific Railroad Company?

A. Yes sir.

Q. Preparing to defend a law suit?

A. Yes sir, if necessary.

Q. Do you know whether that was before Huxoll was buried, or after. Do you know whether Huxoll was dead, when you had Matthews up in that room preparing to defend a lawsuit against this widow and children?

A. I think he was.

Q. Had you inquired?

A. Yes sir, it is my impression or my recollection I had inquired.

Q. But it would not have made any difference in the performance?

A. Where I was supposed to make the investigation, I was simply in the line of duty.

Q. And to get all the witnesses committed against the widow before the husband died, is that the point?

A. We purposed to learn, as soon as we could, the facts in
623 the case, regardless of time.

Q. It makes no difference?

A. Not a bit.

Q. You went out on the ground first?

A. We are supposed to investigate the accident. Of course there is no instruction as to the time of the investigation.

Q. You went out there first, didn't you?

A. We go early, yes sir.

Q. To take your own employees' statements?

A. Yes sir.

Q. And caution them not to make any other statements or not to talk to anybody else?

A. I never caution them not to talk to anybody else.

Q. Didn't you tell Matthews that night, that very thing?

A. No sir.

Q. Will you tell the jury that you didn't tell him that, and to be careful not to tell anything to anybody else?

A. Yes sir, I will tell the jury that. I never cautioned an employee in my life not to tell anything to anybody.

Q. Isn't it one of the rules and regulations of the claim department, and of the railroad company, to prevent as far as possible, their employees talking about these accidents to anybody else, except to the claim agent?

A. I never had any such rule.

Q. Well, what about the custom?

A. Well, it has never been a custom with me.

Q. Well, what about the practice?

A. I never paid much attention, because I never see them again.

Q. Don't you testify in any one of them?

A. This is the first case I ever testified to in the State of Nebraska.

Q. How long have you been in the state.
A. Since June, 1910.
Q. Where did you come from?
624 A. S-uthern Illinois.
Q. What was your business there?
A. In the mercantile business.
Q. What kind of business was it?
A. General mercantile business.
Q. How long have you been railroading?
A. Since June 15, 1910.
Q. Did you come right out of the mercantile business into this business?
A. No sir, there was a few months between.
Q. What were you doing then?
A. Nothing at all.
Q. Do you know whether or not Mr. Matthews could write?
A. Well he signed that paper.
Q. Do you know whether Mr. Matthews could write?
A. Yes sir.
Q. Did you ask him that night whether he could write?
A. I didn't have to ask him.
Q. Why, didn't you say, "Matthews, write this out just as it happened?"
A. Why, didn't I?
Q. Or could you write better than he?
A. Yes sir. Mr. Matthews gave me that statement, and I reduced it to writing.
Q. Why didn't you say, "Now Matthews, you know something about this, take your pencil and sit down here, here is a sheet of paper, I want you to write something about it, to help beat the widow and children." Why didn't you tell him to do that?
A. I told him that is just what I wanted, that I wanted a correct statement of the case.
Q. Well, why didn't you tell him just what I told you?
A. Well, there is a lot of employees that are in the habit of not writing much, and I do it for them.
Q. And you are in the habit of writing lots?
A. I had no objection upon my part in case they desired me
625 so to do.
Q. You don't pretend to say this is the language of Matthews?
A. The language of Matthews?
Q. Yes sir?
A. I reduced that to writing when Mr .Matthews gave me the facts.
Q. You don't pretend to say this is the identical language of Matthews.
A. That is the language thaa he gave to me, and I reduced it to writing.
Q. Actually, letter by letter?
A. Not exactly.
Q. You would not tell the jury that is his language, would you?
A. No I reduced it to writing.

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Q. This is your language, isn't it, every word of it?
A. But he gave me the facts.
Q. It is your language, isn't it?
A. I did the writing, yes.
Q. Answer my question,—it is your language, isn't it, every word of it?
A. There wasn't any language to it.
Q. There wasn't,—what is it?
A. A statement.
Q. Well, it is your statemen*ent* here, it is your statement?
A. No it is Mr. Matthews' statement.
Q. Did you put down,—put this down word by word as Matthews uttered it,—answer my question?
A. Not as he uttered it, no.
Q. This is not the words that he spoke, is it?
A. They are not changed.
Q. The facts in the case are not changed particularly?
A. (No answer)
Q. The words that appear here, represented by your characters are not his words, are they?
A. I do not know as I understand what you are driving at.
626 Q. What ambiguity is there in that question?
A. I do not know how a man would write up a statement unless the other party would give him the facts to write it on.
Q. Do you tell the jury that you can't write a statement?
A. I did not tell you that.
Q. Then why did you say you could not unless somebody told you how?
A. I write the statement that he tells me.
Q. It is your language, isn't it?
A. If you call it that.
Q. Well what do you call it, you are on the witness stand?
A. I reduced it to writing, but he gave me the facts.
Q. He gave you the facts?
A. Yes sir.
Q. And you wrote down the words?
A. Yes sir.
Q. And they are your words, aren't they?
A. I did the writing, yes sir.
Q. If you want to call it that way, I guess you will have to call it?
A. I explained to the jury that I did the writing but under his dictation.
Q. Does it need any explanation?
A. Yes sir.
Q. It requires a lot of explaination to tell the jury whether these characters here are your words or Matthews' words,—it requires explaination, does it?
A. Well, I do not know as I can explain it any more fully than I did before.
Q. But it requires explanation?

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Mr. Strode: The defendant objects to that question as not a fair question, and not definite.

Overruled. Exception.

A. Well, those characters are mine, but as I said before, the
627 only explanation I can give to it, is that I wrote this down as he gave it to me. Of course it is in my writing.

Q. And it is in your words, isn't it?

A. I suppose I may have shaped it up for him, you understand.

Q. That is the point exactly. I thought maybe you shaped it up?

A. I reduced it to writing for him, that is just what I did.

Q. In your own words?

A. Yes sir, as given to me by him. The facts.

Q. In your own words?

Mr. Strode: The defendant objects to that question as having been gone over.

Mr. Comstock: What I want him to tell the jury, and the only thing is,——

The Court: Answer. Defendant excepts.

A. I don't know how to explain it. I don't know what he is driving at. If you will explain it to me,——

Q. Do you want me to explain it?

A. Yes sir.

Q. My explaination is this: I want you to tell the jury whether this writing is in your words or the words of Matthews, is that plain enough?

A. I have explained that half a dozen times.

Q. Does it need explanation?

A. Yes sir.

Q. You say it does?

A. Yes sir, it does.

Q. And to understand that question, it needs explanation, is that your answer?

A. Yes sir.

Q. Do you write as rapidly as a man talks,—do you write long hand as rapidly as a man talks?

A. That is according to how fast he talks.

Q. Do you write as fast as I talk?

A. No sir.

628 Q. Do you write as fast as an ordinary man talks?

A. No sir.

Q. Are you a stenographer?

A. No sir.

Q. Was there a stenographic report taken of Matthews' statement, do they have a stenographer who takes it like the reporter here,—verbatim?

A. No sir.

Q. How many stories is that hotel?

A. Two.

Q. What part of the hotel was you in?

A. I do not recall what room I was in.

Q. What was the number of the room?
A. I think it was number seven.
Q. Who was there with you?
A. Just us two.
Q. Day or night?
A. Day time.
Q. What time of day?
A. Just before dinner.
Q. Where did you find Matthews when you went out there?
A. I think I went out,—I think on the engine, and he came in,——
Q. You told somebody you wanted Matthews?
A. Yes sir.
Q. Who did you tell?
A. I do not know whether I left a call at the round house or went out and saw him personally.
Q. Which did you do,—settle somewhere on that.
A. I would not say for sure.
Q. Which do you think you did?
A. I think I left a call at the round house for him.
Q. You don't think now you left a call personally for him?
A. I said I either did that or went to the foundhouse.

Q. What did you tell him when you saw him?
629 A. When I saw Mr. Matthews, I told him I wanted to get a statement from him about the accident to Mr. Huxoll.
Q. Did you tell him who you were?
A. Yes sir.
Q. What your name was?
A. Yes sir.
Q. Where you were from?
A. I do not know as I told him that. I don't think it was necessary.
Q. Well did you tell him that?
A. I don't think I did.
Q. Did you tell him who you were employed by?
A. Yes sir.
Q. He was then working for the same railroad?
A. Yes sir.
Q. A fireman on the engine?
A. Yes sir.
Q. Took him right off of the engine?
A. Yes sir.
Q. Did you take anybody to relieve him?
A. I haven't anything to do with that.
Q. Did you see him get right off of his engine.
A. It is my recollection that he got off his engine.
Q. Did he cross any tracks going to the hotel?
A. I don't recollect about crossing railroad tracks.
Q. Are there any tracks in Sidney?
A. Yes sir, one or two there, I think.
Q. Does the Union Pacific pass through Sidney?
A. Yes sir.

Q. Do they have any tracks there?
A. Yes sir.
Q. Main line track?
A. Yes sir.
630 Q. And side line track?
A. Yes sir.
Q. How many?
A. You mean close to this depot, or where are you speaking of?
Q. Any place?
A. Several side tracks in Sidney.
Q. You and Matthews went directly to the hotel from the engine?
A. That is my recollection.
Q. Did Matthews stop and wash his face?
A. I do not think so.
Q. Did he stop to wash his hands?
A. I do not think so.
Q. Did he stop to brush his hair?
A. No sir.
Q. Did he stop in the office of the hotel?
A. No sir.
Q. Did you go through the office of the hotel?
A. Yes sir, you have to go through the office to get up,——
Q. Well did you?
A. Yes sir.
Q. Isn't there a way without going through the office to get upstairs?
A. I never went up that way, there may be some side entrance.
Q. Did he go up stairs ahead of, or behind you?
A. He went up behind me, I think; I always take the lead.
Q. And you and he went into this room?
A. Yes sir.
Q. And why didn't you sit down in the office?
A. It was just as convenient.
Q. It was just a little more convenient, wasn't it?
A. Not particularly.
Q. Well you went up there?
A. Yes sir.
Q. You had already engaged the room before?
A. Yes sir.
631 Q. And had it ready?
A. I always engaged a room where I am going to stay in town over night, if I can get one.
Q. Did you have a pen up there?
A. Pen?
Q. Yes sir.
A. Well I didn't have a pen, no sir.
Q. Did you have paper?
A. Yes sir.
Q. And you had an indelible pencil?
A. Surely.

Q. Did you ever take a report with anything else, than an indelible pencil?
A. We always are supposed to take the report in indelible pencil.
Q. And he told you this happened?
A. Yes sir.
Q. And then you wrote the statement?
A. Yes sir, that is just what I did.
Q. And in your own words?
A. I wrote it down just as it is there.
Q. Well Matthews didn't say, "I", and you put down "I"?
A. No sir.
Q. He didn't say "have" and you wrote down the word "have"?
A. No sir.
Q. And he didn't say "Worked" and you write it down?
A. No sir.
Q. So this is your language?
A. Yes sir.
Q. And you read it carefully over to him?
A. No sir, he read it,——
Q. You would not tell this jury that you didn't read this statement to him?
A. No sir.
Q. Do you tell this jury that you didn't read every word of it?
632 A. No sir.
Q. Do you say that you didn't read it at all?
A. I never read it to Mr. Matthews at all, he took the statement and read it himself and signed it.
Q. He took it and looked at it and signed it?
A. He took it and did what?
Q. He took it and looked at it and signed it?
A. Yes sir, he said he did.
Q. Why you would not take his word that he read it would you?
A. Yes sir, I would.
Q. Is that all you know about his reading it, what he said?
A. He sat right there, and read the statement over and signed it.
Q. Is that all you know about whether he read it, what he said?
A. All I know is, I saw him reading the statement apparently.
Q. And he signed it?
A. Yes sir.
Q. And do you tell the jury that all you know about his reading it is what he said?
A. What?
Q. That he read it?
A. No, I asked him to read the statement, and he looked the statement over, and that is all there was to it.
Q. Well didn't he say when he got through, "I have read it."?
A. I do not know that he did.
Q. Didn't you so tell the jury?
A. No sir.

Q. Didn't you tell the jury just a minute ago that he said he read it?

A. No sir.

Q. So he didn't say that he read it?

A. No sir.

Q. So that all you know whether he ever read a thing that is in it, is that you wrote it in your own words, and he took it and signed it?

633 A. No sir.

Mr. Comstock: That is all.

Witness: Yes sir.

By Mr. Strode:

Q. You say that you talked to him and got the statement that is, he told you what the facts were and you wrote them down?

A. Yes sir.

Q. Now at that same time that you sent for Matthews, did you send for the other employees who knew something about the accident and take their statements?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial, and not redirect examination.

Mr. Strode: The defendant objects to that. It is important. Mr. Comstock wants to make it appear here, unfairly that this man was singled out to get a report from.

Mr. Comstock: I object to that remark of counsel.

Mr. Rose: No sir, we don't think that at all, we think he got every employee to commit himself on that.

Mr. Comstock: Objection withdrawn.

Q. Mr. Nicholson was there, and in charge of the round house, or do you know, Mr. Nicholson, whether he was the man?

A. Yes sir.

Q. And I think Mr. Borton who testified here was in charge of the yards, wasn't he, or do you recall?

A. Yes sir.

Q. Working as a yard master?

A. Yes sir.

Q. And there were others,—anyone that was supposed to know anything about the accident?

A. Yes sir.

Q. And that is what you were there for?

A. Yes sir.

Q. Mr. Johnson have you ever been accused of or put upon
634 trial for the commission of any crime?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial.

Sustained. Exception.

Q. You were a merchant in Illinois before you came here?

A. Yes sir.

Q. Did you ever practice law?

A. A little, down in Kansas.
Q. In Kansas?
A. Yes sir.
Q. Now, I will repeat the question,—were you ever placed upon trial for the commission of any crime?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial.
Sustained. **Exception.**

Q. Now your attention was called to the fact as to whether you took this statement of defeat any recovery by the widow of Mr. Huxoll. At the time of this statement, of these different statements, at the time they were made and taken, you may state to the jury whether they were taken with reference to any claim or lawsuit, that Mrs. Huxoll had threatened to bring, or that you knew anything about, or that she was intending to bring?
A. No sir.
Q. What was the sole purpose of taking them?
A. To arrive at the facts as to how the accident happened.
Q. At that time did you know whether Mrs. Huxoll was thinking about bringing a law suit?
A. No sir.
Q. Did you know at that time that Judge Comstock was to be her lawyer?
A. No sir.
Q. If you had known that Judge Comstock was to have been the lawyer, would it have been a part of your duty to have seen
635 him and have him come out there and take the statements?
A. Oh, I don't think so.

By Mr. Comstock:

Q. Did you say you took a statement from Mr. Hower?
A. Who?
Q. Hower?
A. (Not answered.)
Q. Hower?
A. (No answer.)
Q. Well, you took Hower's statement, didn't you?
A. Yes sir.
Q. Have you got that with you?
A. No sir.
Q. You did not bring that along?
A. I never keep any copies of the statement.

Mr. Strode:

Q. You didn't bring Matthews' did you?
A. No sir.
Q. After they are taken you send them in, and you never see them again?
A. No sir.

Witness excused.

636 EVERETT FOSTER, called as a witness on behalf of the defendant, was first duly sworn, and testified as follows upon examination.

By Mr. Strode:

Q. Where do you live?
A. Sidney, Nebraska.
Q. You are in Mr. Nicholson's office?
A. Yes sir.
Q. And what do you do,—what is your work?
A. Clerk for Mr. Nicholson.
Q. You were, in January 1st, 1911?
A. Yes sir.
Q. Prior to that time?
A. Yes sir.
Q. And up to this time?
A. Yes sir.
Q. Now you remember about the time that Mr. Huxoll got,—about the Huxoll accident out there in the yards, about that time?
A. Yes sir.
Q. Did Mr. Matthews on the morning that that happened,—did he, with other employees report through Mr. Nicholson's office? On the blank form that was used by the company, about this accident?
A. I think one man made out a report that evening, and Mr. Matthews reported that evening.
Q. That is your recollection?
A. Yes sir.
Q. Well, you have a printed form that is known as number 2611?
A. Yes sir.
Q. Is that a form that the employees are supposed to fill out or to have filled out?
A. Yes sir, that is the only form I have ever seen in use for that purpose since I have been there.
Q. And that is used in all accidents in the yards?
A. Personal injuries.
637 Q. It is filled out by everybody that knows anything about it?
A. Yes sir.
Q. Now this particular one that is identified here I think on the first trial as Exhibit,—well on this trial as Exhibit 8, look at that exhibit, Mr. Foster, and state if you know anything about it?
A. I recognize this report as a report turned in by fireman Matthews, in regard to this accident.
Q. Is that a carbon copy?
A. Yes sir.
Q. Is this report signed by Mr. Matthews?
A. Yes sir, I recognize that as his signature.
Q. How does it come that there is a carbon copy signed by Mr. Matthews?

A. In making out this report,——
Q. Well are there two made,—that is what I am trying to get at?
A. Yes sir.
Q. He signs two reports?
A. He signs three copies of the same. We keep one for our files and we send two copies into the headquarters.
Q. Who did the typewriting on that exhibit, opposite the questions on the form of the exhibit?
A. I operated the machine.
Q. And how did you take those,—line one here,—it says, "Name, residence, street number, and post office address of person injured" and then there is something written, at the machine,—how do you go through it, to fill out a blank of that kind?
A. Well, whenever there is a case of this kind, in which I operate the machine, to take a statement of the man who is giving it, I hand him a blank form like this, to look at, and call his attention to the question.
Q. How do you call his attention to the question?
Q. I will ask him question number one, and he has a sheet, and then I will wait until he answers and when he answers I will
638 write down exactly what he says in that space.
Q. Do you know what you did on this particular instance with reference to this report,—do you know how that was filled out,—how did you go about it?
A. I went about it in just the manner I have described to you here.
Q. Now I want to call your attention to the answer, under question number,—Sub-division 8, of question 8, Spe-d of engine or cars at the time of accident. Did Mr. Matthews when that question was read to him, or his attention called to that question,—did he give you an answer?
A. Yes sir. This is the answer.
Q. What answer did he give to you?

Mr. Hoagland: The plaintiff objects to that question as not the best evidence.
Sustained. Exception.

Q. Well, did he give you an answer that is in this exhibit?
A. Yes sir.
Q. And under question 19-a, on the back "Was the whistle sounded?", "Was the bell rung, and by whom?" was that question read to him, and did he answer?
A. Yes sir.
Q. And is the answer that he gave in this exhibit, written in there by you on the typewriter?
A. Yes sir.
Q. And as he gave it?
A. Yes sir.
Q. On this exhibit,—Mr. Foster, you notice the next subdivision,—that is 19-a, where it says, was the bell ringing.
A. Yes sir.

Q. Then under that, the machine was used with the X, to X out something that you had written?

A. Yes sir.

Q. And where is that written again?

A. Just above.

639 Q. It has the same thing written above?

A. Yes sir.

Q. When was that correction made?

A. When was that correction made?

Q. Yes sir?

A. Right at the time we were making the report, right at this part,—we didn't proceed any further until we made this correction.

Q. You didn't get the line set right to get the answer to the right line?

A. No we didn't.

Q. And you had to correct it?

A. Yes sir.

Q. Now you may state after having examined that Exhibit, whether that is the statement made to you on that morning, of that day, January 1st, by Mr. Charles B. Matthews?

A. Yes sir.

Cross-examination.

By Mr. Rose:

Q. How old are you?

A. 26 years old.

Q. How long have you been in the service of the Union Pacific Railroad?

A. Seven years.

Q. Are you a stenographer?

A. No sir.

Q. It is a duty of the members of a train crew which encounters a casualty to make out their casualty reports, isn't it?

A. Well, I understand it is their duty to make them out.

Q. And they are furnished blanks for that purpose?

A. Yes sir.

Q. And what was the occasion for the giving of the employees as in this particular case,—your clerical help,—why didn't

640 you give them the blanks and let them make out their reports?

A. Well, I don't know as there was any special reason, that I did that. It has been my practice to do that, in several cases.

Q. Well, you say in several cases. It is also the duty of the employee to take the blank and fill it out,—in his own hand writing, isn't it; without any suggestions from anybody else?

A. I have never seen any rule to that effect, and I do not understand it is the duty of the employees to make out their own reports without suggestions from anybody else.

Q. Well you are probably not familiar with the rules with refer-

ence to casualties, and you do not pretend to be familiar with them?
A. Yes sir.
Q. Well the employees are furnished their own blanks and instructed to make out their own casualty reports in triplicate?
A. Yes sir.
Q. And where there are employees of the department, in which you are a clerk, they hand those triplicate reports to you. Don't they?
A. Yes sir.
Q. Into Mr. Nicholson's office?
A. Yes sir.
Q. What was the motive for relieving the employees of that burden upon this particular accident?
A. This accident was considered as an important accident, and we wanted to get the reports in as quickly as possible. They are due in the general office two days after the time that the accident occurs, and I stayed after the usual working hours on this evening, to see that the report was obtained and sent in with some others.
Q. Did Mr. Nicholson stay too?
A. My recollection is not positive as to whether or not he stayed.
Q. Did Mr. Borton, come in there too? The yard master?
A. I do not remember of seeing Mr. Nicholson in there.
641 Q. Would you say that Mr. Nicholson and Mr. Borton weren't both there?
A. I would not say that.
Q. Who notified the members of the crew, and the persons about the yards, to come in that night?
A. The members of the crew?
Q. Yes sir, the members of the switching crew on engine 213?
A. I do not know anything about that.
Q. Do you send out to have the men come in?
A. No sir.
Q. Well do you know how it happened that they assembled at Mr. Nicholson's office at that night?
A. I do not remember of anything else besides the assembly. Other than Matthews and myself, and possibly Mr. Nicholson.
Q. Didn't Mr. Zimmer come there that night?
A. I do not remember whether or not he did.
Q. Then the only one who came that night was Matthews?
A. Yes sir.
Q. Then the special precaution to keep the office open and to rush reports, only applied to the fireman on this engine is that what you want to say?
A. Yes sir.
Q. Then you didn't make out reports for the others that night?
A. Yes sir, I think I made out another report that night, but I am not sure about that.
Q. Do you think you made out another one after quitting time?
A. Well, not after quitting time.
Q. How was it then?
A. I don't know.

Q. You don't know as a matter of fact,—you don't as a matter of fact have any distinct recollection of what occurred there that evening, do you,—I mean your independent recollection, outside of seeing the paper?

642 A. No, I do not remember very closely of what occurred there that evening.

Q. And you could not tell now, without seeing the reports of that casualty,—and without seeing the files, whether or not you made them out?

A. I remember of making out this report, which is called to my attention.

Q. Well, you can't remember how many of those casualty reports you drew for the employees?

A. That evening?

Q. Yes sir, or with reference to this accident?

A. No sir.

Q. You don't know whether or not you took Zimmer's statement or Hower's statement or Rigg's statement?

A. I am sure that I did not take Rigg's, or Hower's, because they are not employed in our department.

Q. Well, is Zimmer employed in your department?

A. Yes sir.

Q. Did you take Zimmer's statement?

A. I think I did take Zimmer's statement.

Q. Were both the engineer and fireman therr together?

A. I do not remember whether or not they were.

Q. Well, Mr. Nicholson had some interest in fixing the responsibility for this casualty, right while the thing was fresh?

A. I do not know that he did.

Q. You think that he had no interest in that at all?

A. (Not answered).

Q. Well do you say that he didn't have any interest in it,—in fixing the responsibility for this accident ?

A. (No answer.)

Q. Do you mean to say that that accident there would not be of concern to him, as to whether this fatal accident was due to the fault of either member of the engine crew?

643 Yes sir, we would have concern about that,—we would have to get the facts in the case.

Q. You would have an interest in that would you?

A. Myself?

Q. No, Mr. Nicholson's officer?

A. Yes sir.

Q. Could you remember at this time what if anything, Mr. Matthews told you about using the torch within three hours of the time of that accident, to thaw ice off the piston, of the air brake?

A. No, I could not remember that.

Q. You would not say that he didn't tell you that,—that that had taken place, would you?

A. No.

Q. You know if he did tell you that you did not put it in his report, don't you?

A. I do not believe that I put it in his report.
Q. You selected the portions that should go into his report?
A. I selected the portions of what he said?
Q. Yes sir?
A. No sir.
Q. If he told you that that was one of the particulars or incidents there, you did not put it in the report in answering to question 11, did you?
A. About the torch.
Q. Yes sir.
A. I put down everything that Matthews gave me at the time.
Q. As far as you thought material?
A. No, I put down his answer to the question.
Q. But you operated the keys?
A. Yes sir.
Q. And nothing went in there, that you didn't write in?
A. No sir.

(Witness excused.)

644 Mr. Strode: We want to offer from Mr. Matthews' deposition, certain questions, and answers that are referred to and covered by the cross examination of Matthews that was read here. The court will recall that Mr. Pettis cross examined Mr. Matthews in regard to certain inquiries, that weren't made, about the things in his deposition out in Wyoming, and his answers to these questions. Now we want to offer from the deposition, these certain questions, which I will indicate here.

We offer the question following the red numbers as follows, 204, 205, 206, 211, 306, 307, 308, 309, and the answers to these questions.

Mr. Rose: The plaintiff objects to that offer as no foundation laid, and the deposition itself has been discredited and quashed on the motion of the defendants themselves.

Mr. Strode: It there is an objection that there isn't any foundation laid, I will have to back up on that.

645 W. V. Hoagland, called as a witness on behalf of the defendant, was first duly sworn and testified as follows, upon examination.

By Mr. Strode:

Q. What is your name?
A. Walter V. Hoagland.
Q. You were one of the attorneys for the defendant in this suit, at the time that Mr. Matthews' deposition was taken out in Wyoming, weren't you?
A. Yes sir.
Q. And you appeared there as attorney for the plaintiff in the taking of that deposition?
A. Yes sir.

Q. The deposition we refer to is the deposition which I hand you here, and is one of the original files in this case?

A. Yes sir.

Q. This is the deposition, is it?

A. That is the deposition that is filed here?

Q. That is the deposition that we are referring to that was taken out in Wyoming, that was taken on behalf of the plaintiff?

A. That is the report of the deposition that was taken there, and sent in by the notary.

Q. Now Mr. Hoagland, I will ask you if you recall upon your direct examination, you propounded to Mr. Matthews, at that time and place, namely on Saturday, October 5th, 1912, at the law office of Fred Johnson, in Rock Springs, County of Sweetwater, State of Wyoming, between the hours of 9 A. M. and 6 P. M. on that day,—if you propounded to Mr. Matthews this question, "Do you remember Mr. Matthews, of making a statement the day following the accident that you have testified to, resulting in the injury and the death of one Huxoll?"

Mr. Rose: The plaintiff objects to that question as immaterial, irrelevant and incompetent.

Overruled. Exception.

646 A. That was not at Mr. Johnson's office.

Q. What office was it taken at?

A. At the office of the attorney for the Railroad Company, Mr. Taliafero, Jr., and reported by the stenographer for the railroad company.

Q. Well you understand, Mr. Hoagland, I read simply from the notice,—the notice says, it was taken at this place. Well changing the form of the question to conform to the place, where you say this deposition was taken, now I will ask you if you recall this question, I have just called your attention to, being answered by Mr. Matthews at that time and place?

Mr. Rose: The plaintiff objects to that question as immaterial, irrelevant and incompetent.

Overruled. Exception.

A. I don't recall the language which I used. I have a recollection of asking him something about a statement.

Q. And in substance you recall that it was about what I have read to you from this deposition?

A. No, I would not say definitely, only that I have no reason to believe that the reporter has reported me differently from what it was.

Q. Now do you recall that in answer to that question Mr. Matthews, at that time, stated, and gave answer, "Yes sir"?

A. I do not believe Mr. Strode, that I have any recollection,—independent recollection of what he did say?

Q. Well, refresh your recollection from the deposition of Mr. Matthews that I hand you, and state if my refreshing your recollection, or state if you can refresh your recollection from reading that answer?

A. I do not recollect the answer,—but I haven't any reason to believe that it was reported otherwise than correctly.

Q. Now I will ask you if,—

Mr. Rose: We think we are ready to stipulate that the
647 transcript or the extension of the stenographic notes are correct for the purposes of this inquiry. A correct report of the examination, and the answers made. The stipulation, as far as it goes, to obviate,—you can have the benefit of it, that the paper which you hold is for the purposes of this examination, a correct report of the question and answers of the witness Matthews, on the occasion referred to.

Mr. Strode: The particular questions which I refer to are correct?

Mr. Rose: No, we offer to stipulate that it is all correct.

Mr. Strode: I do not know anything about it, except what I am examining about.

Mr. Rose: We offer the stipulation, going to the entire report, or the entire deposition.

Mr. Strode: I do not care to stipulate that, at all.

Q. Now I will ask you if at that time, this question was asked Mr. Matthews. "Do you remember what you stated in that statement?"

A. I do not recollect using that language, but if you are reading from the deposition I have no reason to doubt the correctness of it.

Q. Well, would you say that such a question as that was propounded to Mr. Matthews by yourself upon direct examination?

Mr. Rose: The plaintiff objects to that question as already fairly and frankly answered.

The Court: Yes sir, I think you are right Mr. Rose.

Q. Calling your attention to the exhibit, which you have in your hand, I will ask you to state if you can refresh your recollection, as to whether such a question was propounded to the witness Matthews, by you?

A. I believe I propounded such a question. From reading it in this paper, because I have no reason to doubt the correctness of the transcript.

648 Q. I will ask you if in answer to that question, Mr. Matthews said "Well, I don't know."

A. Well, I don't know.

Q. You don't know?

A. No sir.

Q. Well, you would not say that was not the answer, he gave?

A. No sir.

Q. Now I will ask you if at that time and place, you asked Mr. Matthews, this question, "Do you remember that the accident was fresh in your memory at the time of that statement?"

A. Yes sir, I remember of asking him that question.

Q. And you remember his answer, "Yes sir, I believe I do."?

A. Yes sir, I remember that answer.

Q. Then was this question asked him,—Calling your attention to

question 211, "The statement was taken from your statement, and read to you, and afterwards you signed the same." do you recall that question being propounded to Mr. Matthews?"

A. No I don't,—Well I asked him to state something about that. I remember distinctly asking something about that, but whether or not it was in that form I do not know.

Q. And wasn't his answer to that question "Yes sir"?

A. Yes sir, I think that is correct.

Q. Mr. Hoagland, calling your attention to question number 305, of this exhibit, that you hold, I will ask you if you recall at that time and place if this question was asked him, "You weren't looking for anyone on that main line then were you"? I am not sure whether or not that was in the cross examination or not, you might see?

Mr. Rose: You haven't offered 305.

Mr. Strode: No, that is just preliminary.

Mr. Strode: Let me change the form of the question so that it discloses it is on cross examination,——

A. I haven't any independent recollection about it.

649 Q. Well refresh your recollection from this exhibit, and state whether that question, in substance was asked of this witness Matthews, at that time and place on cross examination?

A. I think that that question was asked, but I would not say for sure. That is from independent recollection.

Q. And wasn't this answer given to the question, by Mr. Matthews: Q. "You weren't looking for anyone on the main line then, were you?" A. "No sir, I wasn't."

A. I believe that question and answer were given.

Q. Now calling your attention to question number 306, I will ask you to state if at that time and place, on cross examination, this question was not asked Mr. Matthews "Now you said, Mr. Matthews, that this engine was running eight or ten miles an hour, I will ask you how you know how fast that engine was running?" do you recall of such a question as that being asked him at that time?

A. Well, the counsel asked the witness some question like that, but I do not remember the form of it.

Q. You can't remember the exact words?

A. No sir.

Q. But the substance of it is embodied in that question as you recall it?

A. Well I could not say except that it is the reporter's notes.

Q. Didn't he answer to that, "I don't know positively."?

A. Well I remember of answering to some question that he did not know positively how fast it was running, but I do not know whether or not is was to this question.

Q. And then wasn't that question, followed by this question, 307, "It may have been running three or four miles an hour, is that right?" and wasn't his answer, "Well it might and it might have been running faster than that."?

A. Yes sir, I remember that answer.

Q. Then do you remember this question following that,
650 "Did you not make a statement the day after this accident occurred that you were running three of four miles an hour" and wasn't his answer to that question, "Well I can't remember, I might have made it."

A. Well I can't remember distinctly.

Q. Do you say, Mr. Hoagland, as counsel for Mrs. Huxoll that at the time that deposition was taken, that Matthews wasn't asked the question that he didn't state on the next day after that accident that that engine was not running more than three or four miles an hour, and that he didn't then testify that he didn't remember, that he may have made that statement?

A. I am satisfied that he did from reading this paper, from a report of it.

Mr. Strode: The defendant now offers the questions 205, 206, 211, 307, 308, and the answers to each of them, inquired about from this witness.

Mr. Rose: The plaintiff objects to the offer as a mere repetition, and no foundation laid, and the deposition not being sufficiently authenticated, and the court having by an order discredited the certificate to authenticate the deposition, upon an objection by the defendant company.

Sustained as to foundation. Exception.

Q. I want to know Mr. Hoagland if you weren't the counsel representing Mrs. Huxoll, at the time Mr. Matthews' deposition was taken?

A. Yes sir.

Q. And I want you to state to the jury whether the substance of the questions which I have propounded to you weren't propounded to Mr. Matthews at that time and place?

A. Well, as I said, Mr. Strode, before, I believe they were from reading the short hand notes, but there was so many questions and the examination was so long that I can't remember independently as to these different separate questions.

651 Q. You can't remember the exact words in forming any questions?

A. And I examined it all at the time and I believe it was correctly transcribed.

Q. And that the substance embodied in these questions which I have given to you were embodied in the questions which were propounded to him, I am not asking for the identical form, because you could not be expected to remember that?

A. Only as I said.

Q. And the substance of the answers were given by him as you recall it?

A. I do not recall only as I stated on the witness stand, independently of the paper which I read here.

Mr. Strode: Now we renew the offer of these identical questions. Not because they are embodied in a deposition, but upon the independent proposition that the substance of those questions was

propounded to the witness, and the substance of these answers were given at that time and place, within the recollection of this witness.

Mr. Rose: I would like to cross examine the witness before your honor rules.

Cross-examination.

By Mr. Rose:

Q. Do you remember these particular questions, about which inquiry had been made, independent of their connection with the whole deposition?

A. No, only the one question, which I say I remember now.

Q. Did you look over the deposition at the time, or shortly after it was transcribed, while the matter was fresh in your memory?

A. I looked over a carbon copy forwarded to me, some little time after that.

Q. Now is your opinion based wholly upon the fact that you found the whole deposition to be in substantial conformity to the
652 deposition, and statements of the witness as it actually occurred?

A. Yes sir.

Q. And you would not verify any one question, except as you could verify the whole deposition?

A. Yes sir, that is all.

Q. You were attorney when this suit was commenced?

A. Yes sir.

Q. And you dealt personally with Mrs. Huxoll?

A. Yes sir.

Q. And you brought your report of your examination to me in the city of Omaha?

A. Yes sir.

Q. And you were the one who interviewed me,—instead of Mrs. Huxoll?

A. Yes sir.

Q. And employed me?

A. Yes sir.

Q. And I have never been to North Platte on this?

Mr. Strode: The defendant objects to that question as improper cross examination.

(Question withdrawn.)

Q. Had you directly or indirectly interviewed Mr. Matthews at the time this suit was brought?

Mr. Strode: The defendant objects to that question as improper cross examination.

Sustained. Exception.

Mr. Strode: Now we will insist upon our offer.

Mr. Rose: The plaintiff objects to the offer as a mere repetition, and no foundation laid, and the deposition not being sufficiently authenticated, and the court having by an order discredited the

certificate to authenticate the deposition, upon an objection
653 by the defendant company.

Sustained. Exception.

Mr. Rose: As far as that foundation is concerned, we still offer the stipuation on condition that the counsel will stand for it going to the deposition generally, and I will give him that stipulation if he wants to make it.

Mr. Strode: These questions are not based upon the deposition. They are based upon the examination of the witness Hoagland, and disclaiming any foundation on the deposition on file here.

The Court: I will sustain the objection as heretofore. Exception.

Mr. Rose: There is one question there, where the witness says that he has an independent recollection of it, and we will withdraw all opposition or objection to that question.

Mr. Strode: Let the record show that under the ruling of the court, I am reading question 211, only, and the answer.

Reads as follows to the court and jury: "Q. The statement was taken from your statement, and read to you, and afterwards, you signed the same?" A. "Yes sir."

Mr. Hoagland: The plaintiff withdraws its objection to question 206.

Mr. Strode: All right I will read it.

Reads as follows to the court and the jury:

"Do you remember that the accident was fresh on your memory, at the time of that statement?" A. "Yes sir, I believe I do."

Mr. Strode: Let the record show that we offer separately question 205, and the answer.

Mr. Rose: The plaintiff objects to the offer as no founda-
654 tion laid, because upon counsel's own statement, that he does not desire to credit the authenticity of the written report of the examination, in the form of the deposition, which has been quashed. And because the deposition is not signed by Mr. Matthews, or otherwise identified by him, and the certificate of the officer taking the deposition has upon the motion of the defendant itself, been adjudged wholly insufficient to authenticate the testimony.

Sustained. Exception.

Mr. Strode: The defendants offer- in evidence question 204 and the answer from the deposition of Charles B. Matthews:

Mr. Rose: The plaintiff objects to the offer as no foundation laid, because upon counsel's own statement, that he does not desire to credit the authenticity of the written report of the examinaion, in the form of the deposition, it has been quashed. And because the deposition is not signed by Mr. Matthews, or otherwise identified by him, and the certificate of the officer taking the deposition h-s upon the motion of the defendant, itself, been adjudged wholly insufficient to authenticate the testimony.

Sustained. Exception.

Mr. Strode: The defendant offers in evidence question number 306 and the answer from the deposition of Charles B. Matthews:

Mr. Rose: The plaintiff objects to the offer as no foundation laid.

Because upon counsel's own statement that he does not desire to credit the authenticity of the written report of the examination, in the form of the deposition, it has been quashed. And because the deposition is not signed by Mr. Matthews or otherwise identified by him, and the certificate of the officer taking
655 the deposition has, upon the motion of the defendant, itself, been adjudged wholly insufficient to authenticate the testimony.

Sustained. Exception.

Mr. Strode: The defendant offers in evidence question number 307 and the answer from the deposition of Charles B. Matthews, on file in this court.

Mr. Rose: The plaintiff objects to the offer as no foundation laid. Because upon counsel's own statement that he does not desire to credit the authenticity of the written report of the examination, in the form of the deposition, it has been quashed. And because the deposition is not signed by Mr. Matthews, or otherwise identified by him, and the certificate of the officer taking the deposition has, upon the motion of the defendant itself, been adjudged wholly insufficient to authenticate the testimony.

Sustained. Exception.

Mr. Strode: The defendant offers in evidence question number 308 and the answer from the deposition of Charles B. Matthews on file in this court:

Mr. Rose: The plaintiff objects to the offer as no foundation laid. Because upon counsel's own statement that he does not desire to credit the authenticity of the written report of the examination, in the form of the deposition, it has been quashed. And because the deposition is not signed by Mr. Matthews, or otherwise identified by him, and the certificate of the officer taking the deposition has, upon the motion of the defendant itself, been adjudged wholly insufficient to authenticate the testimony.

Sustained. Exception.

Mr. Strode: The defendant offers in evidence question
656 number 309 and the answer from the deposition of Charles B. Matthews on file in this court.

Mr. Rose: The plaintiff objects to the offer as no foundation laid, because upon counsel's own statement that he does not desire to credit the authenticity of the written report of the examination, in the form of a deposition, it has been quashed. And because the deposition is not signed by Mr. Matthews, or otherwise identified by him, and the certificate of the officer taking the deposition has, upon the motion of the defendant itself, been adjudged wholly insufficient to authenticate the testimony.

Sustained. Exception.

Witness excused.

657 JOHN A. NICHOLSON, recalled as a witness on behalf of the defendant, testified as follows, upon examination.

By Mr. Strode:

Q. You were called as a witness on behalf of the plaintiff?
A. Yes sir.
Q. And have already testified here before this jury?
A. Yes sir.
Q. I want to ask you something about the,—first, do you remember whether you were in your office when Mr. Foster made out the report that was made out and signed up by Mr. Matthews?
A. Yes sir.
Q. Were you?
A. Yes sir.
Q. And did Mr. Zimmer make a report at the same time?
A. Yes sir.
Q. Which one of the employees of the engine crew, would be required to report through your office?

Mr. Comstock: The plaintiff objects to that question as immaterial.

Overruled. Exception.

A. Only the engineer and fireman.
Q. And the switchman,—where would they report,—what department would they go to?
A. They would report directly to the yard master and the assistant superintendent.
Q. The engineer and firemen, are they,—they work out of your department?
A. They work out of my department, but while they are on the engine working they are under the transportation department,—outside of my having charge of the,—it is pretty hard to distinguish just where the line does stop, but I do not have anything to do with the movements of the trains or the movement of the engines.
Q. Oh, there is a division there?
658 A. Yes sir.
Q. And there are certain employees that would have to report through Mr. Johnson, the man who has charge of the tracks?
A. Yes sir.
Q. And other employees would report through the operating department of the yard master?
A. Yes sir.
Q. And others would report through you as the round house foreman?
A. Yes sir.
Q. Now the reports that Matthews made out, were you there when it was made out?
A. Yes sir.
Q. And do you recall how the blank was filled out,—what method was pursued in getting the,—or making out the report?
A. Yes sir.

Q. And how it was gone about?
A. Yes sir.
Q. How was that report made out?
A. The clerk generally makes the report on the machine, and he did in this case, because we can make them on a machine faster than a man can write them, and he always gives them a sheet of this, so that he can be ready to answer the next question, after he asks them question one.
Q. And then question two is asked by him?
A. Yes sir.
Q. And so on?
A. Yes sir,—and sub-divisions, if there are any.
Q. How much time would be taken in filling out the report like that.
A. I think he can make one of them in about 15 minutes.
Q. Now I think you have already stated, that you had charge of the locomotives or engines when they came to the round-house?
A. Yes sir.
Q. Well did you have charge when they were in the yards
659 before they came to the round house, or at what point did these locomotives come within your care?
A. After the engine crew had got off of them,—and they ordinarily leave at the coal chutes.
Q. And at that point you take them and take care of them until the engineer is on them again?
A. Yes sir.
Q. Now in sending them out, where do you place them for the crew that is to take them out?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial, and no foundation laid for this and this witness testifying that he had nothing whatever to do with the operating department or trains and engines.
Overruled. Exception.

A. We placed them on the spot track.
Q. That is the spot track that is shown here in Exhibit 4?
A. That is one of them.
Q. Are there more than one spot track?
A. Yes sir.
Q. This track running from the west side of the turn table, shown in Exhibit 4, is that a spot track?
A. Yes sir.
Q. And this one running from the east, is the one that is involved here?
A. Yes sir.
Q. Now, does the turn table,—this is the turn table, which is shown here,—this portion of it is the portion that turns to meet each one of these tracks? (Indicating both turn table and tracks)?
A. Yes sir.
Q. Which engines are stationed on this spot track running to the

west, and what engines are placed upon this one running to the
660 east, if there is any particular rule of placing engines on these tracks?

Mr. Comstock: The plaintiff objects to that question as immaterial irrelevant and incompetent, and particularly no foundation laid.

The Court: Lay the foundation laid. Sustained as no foundation. Exception.

Q. Who has charge of the engine from the time it goes,—it is left at the,—where is it, the cinder pit or the coal chute?

A. Well, you could call it the round house,—the engineer turns the engine into the round house, and it is in my charge after that.

Q. And it is in your charge until when?

A. Until it is placed on the spot track, and the engine crew gets it.

Q. How long have you been in that branch of the service at Sidney?

A. 7 years.

Q. And are you acquainted from your employment there, with the practice,—the ordinary practice of placing the engines on these spot tracks?

A. Yes sir, I am.

Q. That comes from day to day in the service?

A. Yes sir.

Q. Now you may state if there is any particular classification of engines that are put upon the west spot track and upon the east spot track, or if there is any division of any kind, by rule or practice?

A. The practice at that time was to put all passenger engines on the west spot track, and all east bound freight engines on the east spot track, and west bound freight engines on either track.

Q. That is the freight engines whether going east or west, were placed upon either track,—no,—the freight engines going west were placed upon either track?

A. Yes sir.

Q. And all passenger engines were placed upon the west track?

661 A. Yes sir.

Q. And all freight engines going east were placed upon the east track?

A. Yes sir.

Q. Now was there any rule of the company, or practice, of placing any particular engine at any particular point on the spot track, from day to day?

A. No sir.

Q. Taking this accident here,—Mr. Huxoll's engine was 1909 wasn't it,—that was the number of the engine that he was to take out that morning?

A. Yes sir.

Q. Now was there any rule in practice of placing engine 1909 at any point,—particular point on the spot track, running east from the turn table?

A. No sir.

Q. Was there any rule or practice with reference to the location

of that engine on the spot track, in relation to other engines that would be placed upon this same spot track,—freight engines, going east?

A. I do not understand the question.

Q. Well, would 1909,—Mr Huxoll's engine,—was there any rule or practice that placed that engine ahead or behind any other particular engine that might be placed upon that spot track?

A. Well, frequently it would be that the first engine called, goes to the east.

Q. The first engine called, would be the furtherest east?

A. Yes sir.

Q. But in this instance, Mr. Huxoll's engine, was number 1909?

A. Yes sir.

Q. And Mr. Orton's engine was 1913?

A. Yes sir.

662 Q. Now was there any rule or practice that placed 1909 on that track, any place with respect to 1913, or did these numbers 1909 or 1913 have anything to do with the location on the spot track?

A. Both of these engines were called for the same time, a double header, and it would not make any difference where we set them, or what time we sent them out, the first engine that is supposed to leave Sidney, first, is set out first.

Q. And there is no distinction made about the number of the engine?

A. No sir.

Q. It might be 213, that would be sent out behind or ahead of 1913?

A. Yes sir.

Q. The number of the engine has nothing to do with that?

A. No sir.

It now being 12 o'clock Noon, October 22nd, 1913, court adjourned to meet at 2 o'clock P. M. that same day October 22nd, 1913.

2 o'clock P. M. October 22nd, 1913, court met pursuant to adjournment, and the following proceedings were had and done.

J. A. NICHOLSON, recalled testified as follows upon examination,

By Mr. Strode:

Q. What is the correct title of your position with the Union Pacific?

A. District foreman.

Q. District foreman?

A. Yes sir.

663 Q. And that was your position, in 1911?

A. Yes sir.

Q. Now I think you testified about these two engines, 1913, and 1909, being brought out of the round house, that morning, and being placed on the spot track?

A. Yes sir.

Q. Are you acquainted with the practice and custom in the yards there, about the spot track, of engineers going to their engines on the east spot track?

A. Yes sir.

Q. Do you know the way they go to reach their engines?

A. Yes sir.

Q. Assuming that there are two engines here on this spot track 1913, and 1909, and the engineer is going out to get his engine on the spot track, has he any advice or information from you, or any other source, when he leaves the wash house, as to which of the two engines is the engine that he is to take?

A. No sir.

Q. What advice does he receive from you, or your department as to the location of his engine, if any?

A. None.

Q. Does he receive any advice as to where his engine is,—that is upon what track?

A. No sir.

Q. This track is simply used for that purpose?

A. Yes sir.

Q. So that an engineer leaving the wash house, to go to his engine, on the spot track, assuming there are two engines on the spot track, 1913 and 1909, what engine would he go to first?

A. He would go to the engine that is nearest the wash house,—that is he would pass by it at least.

Q. That is, he would go near enough to it at least, to see that is his engine, or to see whether it — or not?

664 A. Yes sir.

Q. Would he have any other means than by going to the engine, or than seeing what engine the first engine is, to determine whether that was the engine he was to take?

A. No sir.

Q. Now on the morning of this accident, who took out,—or do you know who took engine 1909 from the round house, to put it upon the spot track?

A. I did.

Q. At what time, in the morning, do you recall?

A. Just previous to taking out engine 1913.

Q. Who took out engine 1913, and put it upon the spot track?

A. I did.

Q. And do you recall about what time of the morning it was that these two engines were taken out, and put on the spot track?

A. Yes sir.

Q. Tell the jury about when it was, that they were taken from the round house, and put on the spot rack?

A. 1909, was put on the spot track, in the neighborhood of 10:30, and the other engine was put on the spot track in the neighborhood of 5 or ten minutes to 11.

Q. When 1909 was put upon the spot track, did you give the engine water, at the water crane?

A. No sir, not I myself.

Q. Well, was it given water at the water crane?
A. Yes sir.
Q. When engine 1913 was brought out,—I think that is the engine that you testified you were there at the time giving water to?
A. I assisted the man to turn the crane.
Q. And that is what was being done there at the time of this accident?
A. Yes sir.

665 Q. Where was 1913 and 1909, located on this spot track with reference to this water crane?
A. 1909 was a little bit east of the water crane, and 1913 was standing at the water crane.
Q. What part of 1913 was standing at the water crane?
A. This rear end of the tank.
Q. So that the water could be put in from the crane?
A. Yes sir.
Q. Were there any other engines on that spot track excepting these two engines,—1913 and 1909?
A. No sir.
Q. Does this blue print here show the location of those two engines on this spot track with reference to the,—the proper location of them—with reference to this water crane?
A. Yes sir,—other than that engine towards the east might be back a little farther,—it was ten or fifteen feet between those two engines.
Q. Well, it is just about that distance as shown on this blue print?
A. Well, it looks a little closer, there. It would be hard to tell from looking at the blue print.
Q. Well, you can see the distance between the track,—the south rail on the spot track there and the north rail of the main track there, can't you?
A. Yes sir.
Q. And that I think was 12 feet?
A. Well, it is approximately correct.
Q. And this distance was very close to being correct,—on the blue print?
A. Yes sir.
Q. Now how long have you been there as district foreman,—the foreman at the round house,—had you been there prior to January 1st, 1911?
A. About 5 years,—no, since November 1906.

666 Q. Now in the course of your employment there, in that position, and in the course of the discharge of your duties there in that position, did you have occasion to know and see how the switch engines were operated in that yard?
A. Yes sir, I saw them operated there.
Q. And to what extent did you see the operation of switch engines in that yard?
A. Well, I have seen them operated all over the yard, and have ridden on the engines frequently,—well, not frequently but

occasionally, and I have also seen them when ever I was on the ground in the vicinity of the round house.

Q. Well, what I am trying to get at, is whether or not that was a daily occurrence?

A. Yes sir.

Q. You saw them there every day?

A. Yes sir.

Q. Are you acquainted from actual observation extending back through a period of five years prior to this accident of the practice in the matter of operating the switch engines in your yard?

A. Yes sir, I think I am.

Q. Do you know whether or not there was, or was not a custom or practice, in that yard, on January 1, 1911, or prior to that time of having any switchman riding on the leading end of the engine through the yards, for the purpose of warning or giving warning to the engineer of obstruction upon the track, or flagging the engine through steam or smoke?

A. No sir, there was no practice that I knew of, or observed.

Q. Did you ever see that in that yard prior to January 1, 1911?

Mr. Comstock: The plaintiff objects to that question as immaterial irrelevant and incompetent, and improper cross examination of his own witness, and already answered.

Overruled. Exception.

667 A. I have seen switchmen riding on the front end, but I have never seen any of them doing any flagging.

Q. What has been,—what have you observed about switchmen riding on the engine,—just tell what you have observed?

A. The switchmen ride most any place on the engine.

Q. For what purpose?

A. Well to stay with their work.

Q. Are you acquainted from actual observation, and were you acquainted from actual observation, prior to January 1, 1911, and on that day, with the course taken by engineers and firemen in leaving the wash house and going to their engines located on these spot tracks?

A. Yes sir.

Q. What course was taken by such engineers and firemen in going from the wash house to engines spotted on the east spot track?

A. Well they would take a course south and east from the engineers from across the west spot track.

Q. That is the one? (Indicating.)

A. Yes sir.

Q. And then going between the turn table and the main line, down to the other spot track, until they got to their engines?

A. Yes sir.

Q. Did you ever see in your experience there, an engineer or fireman walking down between the rails of the main track, in going east from the turn table, to the water crane?

Mr. Comstock: The plaintiff objects to that question as imma-

terial irrelevant and incompetent, and cross examining his own witness.

Overruled. Exception.

A. No sir.

Q. Did you,—do you receive as the division,—the district
668 foreman, in your department, the work orders that are given by the engineer who turns over an engine that he has been operating either in the yards, or on the road, Mr. Nicholson?

A. Yes sir.

Q. Calling your attention Mr. Nicholson to Exhibit 12, I will ask you to examine that exhibit and state to the jury what that exhibit is?

A. That is the work reports turned in by engineer Stewart on January 1, for engine 213.

Q. Is that the form of a work report that the engineers turn into your department upon bringing an engine in either from the switch yards or from the road?

A. Yes sir.

Q. And would you say whether or not that report was made to you by Mr. Stewart at the time this engine was brought into you on the morning of January 1st?

A. Yes sir, that is the report.

Q. That was one of your files?

A. Yes sir.

Q. What is the ordinary practice in the matter of switch engines in that yard, where repairs are to be made, when the crew turns the engine back to you?

Mr. Comstock: The plaintiff objects to that question as wholly immaterial.

Sustained. Exception.

Q. You were present at the time that Mr. Huxoll was being taken out from this engine?

A. Yes sir.

Q. Did Mr. Zimmer turn that engine over to you and if so, where, Mr. Nicholson?

A. He turned it over between the ash pit and the coal chutes.

Q. Did he at that time and in the course of his duty in that respect, make any report to you or statement to you as to any reports that would be required to be made on that engine?

669 Mr. Comstock: The plaintiff objects to that question as hearsay, and further as immaterial irrelevant and incompetent.

Overruled. Exception.

A. Yes sir.

Q. You may state to the jury what report or statement Mr. Zimmer made to you at the time the engine was turned over to you by him there in the yards immediately after this accident as to what repairs, if any were required to be made on this engine.

Mr. Comstock: The plaintiff objects to that question as immaterial irrelevant and incompetent, a self serving declaration, and hearsay, and subsequent to the time of the accident.

Sustained. Exception.

Mr. Strode: The defendant offers to prove by the witness that Mr. Zimmer the engineer at the time he turned the engine over to Mr. Nicholson, the division foreman, immediately after the accident, stated that the engine, was O. K. and no repairs were required except the replacement of the brake rigging, which had been taken down in order to get Mr. Huxoll out from under the engine.

Mr. Comstock: The plaintiff objects to that offer to prove as immaterial irrelevant and incompetent, and merely a self serving declaration, after the occurrence of the casualry, and hearsay.

Sustained. Exception.

Mr. Comstock: That is all, there is no cross examination.

Witness excused.

670 MERIAM W. RIGGS, called as a witness on behalf of the defendant, was first duly sworn and testified as follows, upon examination.

By Mr. Strode:

Q. What is your name?

A. Meriam W. Riggs.

Mr. Riggs, you are the Mr. Riggs who has been referred to here in the testimony as the switchman, on this engine at the time of Mr. Huxoll's injury?

A. Yes sir.

Q. What time in the morning did you go out with Mr. Zimmer to work on the switch engine there at Sidney that morning?

A. Six o'clock in the morning.

Q. Was Mr. Borton your yard master?

A. Yes sir.

Q. And with each engine, what constitutes the crew for switching purposes in the yards?

A. A yard master and two helpers.

Q. That is, outside of the engine crew?

A. Yes sir.

Q. Which consists of the engineer and the fireman?

A. Yes sir.

Q. And what position do these two helpers, or what division of work is there, in the switching between these two helpers.

A. One follows the engine, and the other one, when they are switching, couples cars and sets brakes and is called the field man?

Q. Called what?

A. The field man.

Q. What did you do?

A. I followed the engine.

Q. What were you called?

A. Engine man.

Q. How long had you been a switchman in the yards at
671 Sidney, prior to the time that Mr. Huxoll was injured?

A. Ever since 1905, up to the time.

Q. Had you been in the switch crew, switching there from day to day up to the time that Mr. Huxoll was injured,—ever since 1905?

A. Yes sir.

Q. Did you become acquainted with, and know the practice observed in switching in that yard, prior to the time Mr. Huxoll was injured?

A. Yes sir.

Q. And what was the custom and practice in switching in the yards at Sidney, with respect to having the switchman right on the foot board at the leading end of an engine in going through the yard in order to give warning of any obstruction on the track, or to flag through any steam or smoke,—what was the practice, if any such practice was observed?

A. There was no practice of flagging whatever, and the switch man rode wherever it was convenient for his work.

Q. And in thar respect would he ride at any particular place upon the engine?

A. No sir.

Q. Did you become acquainted with, and know from actual observation, the route taken by engineers and firemen in going from the wash house to their engines located upon the east spot track?

A. I did.

Q. You may tell the jury what course such engineers followed, and what route they took in going from the wash house to their engines located upon the east spot track?

A. From the wash house down across this track, and down this gravel path, and sometimes across the table, and go down to the spot track.

Q. Would that course take them between the east spot track and the main track, shown on this blue print, exhibit number Four?

A. Yes sir.

672 Q. In the time that you were employed in the switch yards at Sidney, since back in 1905, did you ever see or know of an engineer walking down between the rails of the main track from the point about the turn table, east toward the water crane?

Mr. Rose: The plaintiff objects to that question as immaterial, and what this witness's knowledge of any particular incident may be is an immaterial matter.

Overruled. Exception.

A. No sir, I never.

Q. On that morning as you came back on this engine, backing west, did you expect to find a man between the rails of the main track at a point near that water crane?

Mr. Rose: The plaintiff objects to that question as immaterial, irrelevant and incompetent, and as self serving.
Sustained. Exception.

Mr. Strode: The defendant offers to prove by the witness that at the time referred to in the question, the witness didn't expect to find a man between the rails of the main track, at a point near the water crane.

Mr. Rose: The plaintiff objects to the offer as immaterial irrelevant and incompetent, and a mere hearsay and self serving declaration, and not an inquiry as to any fact.
Sustained. Exception.

Q. You took this engine in the morning, at six o'clock?
A. Yes sir.
Q. Where did you go to work with it?
A. Yes sir.
Q. In the yards with that engine, this morning?
A. Well, off and on, all over the yards.
Q. And what were you doing?
A. Switching putting up coal and making up trains and breaking up trains.
Q. By breaking up trains what do you mean,—taking cars out of trains and putting them in another?

673 Mr. Rose: The plaintiff objects to that question as leading.
Sustained. Exception.

Q. Now where were you at the time you started back east, shortly prior to this accident, where were you in the yards?
A. Down in the east end of the yards, doing switching.
Q. That is, this end over here?
A. Yes sir.
Q. Which way was the engine going,—that is which way was the engine heading as you came back?
A. Headed east.
Q. The pilot end of the engine was east?
A. Yes sir.
Q. Which way were these engines headed that stood on the spot track, 1909, and 1913?
A. Headed east,—we were going west and backing down.
Q. Now you were backing up,—the tender end of your engine was backing up?
A. Yes sir.
Q. And as you came back past the point where the water crane is located, when did you first notice that there was anything wrong or that you had run onto something, or somebody,—about where was that?
A. Right in the fog, and steam, there, west of the water crane.
Q. And what first attracted your attention?
A. I felt a jolt on the steps of the tank or the tender.

Q. Examine exhibit 10, and state if that is a picture of the engine 213, and tender?

A. Yes sir.

Q. Now will you indicate on this picture, the steps or place upon that engine, where you were at that time?

A. Down here on this lower step by the tender right here.

Q. What were you holding onto if anything?

A. This grab iron on the tank, and one on the cab.

674 Q. These two there? (Indicating.)

A. Yes sir.

Q. Where was Mr. Zimmer, the engineer, while you were in that position.

A. Up here in the cab, with his head out of the window of the cab.

Q. Was there a window there?

A. Yes sir.

Q. Was that window open or closed?

A. Open.

Q. Could he stick his head out of the window if it wasn't open?

A. No sir.

Q. Now you were standing on that step?

A. Yes sir.

Q. And what was it you observed while you were in that position, that called your attention to that fact, that something had gone wrong?

A. I felt a jolt on the walls of the tank next to the step.

Q. The front wheels of the tank, next to the engine?

A. Yes sir.

Q. Now when you felt that jolt, what did you do then?

A. I hollered for the engineer to stop, that we were on the ground. or on something.

Q. That is the engineer, Zimmer?

A. Yes sir.

Q. What did Mr. Zimmer do when you said that to him?

A. Well he started to stop here, and I got off, just before he stopped, and I ran to the rear end of the tank to see if I could see, and I could not see anything and I ran back to the rear end of the pilot to see if the wheels were on the ground.

Q. Now when you went to the back end, did you go clear around it?

A. I went around this way, and then came back this way.

Q. Did you go around in front of the pilot on the engine?

A. Yes sir.

Q. And what did you see there if anything?

A. I seen a hand bag or grip.

675 Q. Where was that hand bag or grip lying with reference to the end of the pilot of the engine?

A. Well, it was right in the center of the track, about three feet east of the pilot.

Q. Where did you go from there, if anywhere,—or what did you do?

A. I went back here towards the engineer's side.

Q. Did you know at that time that anyone had been run over, or what the real situation was?

A. No, I did not at that time, yet.

Q. And then you came back?

A. I came back here where I got off and then I heard a yell of some kind, and I went around on this other side, and here was a man under the engine.

Q. When you got around there, could you see the man under the engine?

A. Yes sir, I could see the hand sticking out there under the driver.

Q. Could you, or did you see the man there from your side, when you got down onto the ground?

A. No sir.

Q. And you did look at the wheels on this side to see if they were on the track?

A. Yes sir.

Q. Well, did you help.—what did you do at that time, from that point, what did you do next?

A. I went to the office and reported, and got help, and told them what was the matter?

Q. To what office?

A. To the yard master's office up to the telegraph office.

Q. And then you came back?

A. Yes sir.

Q. And Mr. Huxoll in the course of time was taken out from under the engine?

A. Yes sir.

676 Q. Did you observe or did you know whether the bell was ringing when you came back from the east end of the yards as you came on back past the point where this accident happened?

A. Yes sir, the bell had been ringing pretty nearly all morning, on account of the wind blowing and some snowing and snow blowing. In a case of that kind the bell most generally rings all the time.

Q. If the bell had not been ringing, and could not be rung, for any cause, would you have operated that switch engine in the switch yards?

Mr. Rose: The plaintiff objects to that question as immaterial and incompetent, and as self serving.

Sustained. Exception.

Mr. Strode: The defendant offers to prove by the witness that if the bell had not been ringing, for any cause, engine 213, would not have been operated in the switch yards.

Mr. Rose: I am not going to object to that offer, or to the proof tendered, if the witness wants to say so.

Mr. Strode: Read the last question.

Q. (Last question read as follows:) If the bell had not been ring-

ing, and could not be rung, for any cause, would you have operated that switch engine in the switch yards?

Mr. Rose: No objection to that question.

A. No, I do not presume the engineer would use the engine, if the bell was not ringing.

Q. If the brakes would not work for any cause, and could not be made to work by the engineer, for any cause, in the yards, would the engine be used, in the switching in that yard?

A. It would not.

Q. Do you know from anything that you saw that you can tell the jury, about whether those brakes at the time of this accident were working upon that engine and tender?

A. Yes sir, I am.

Q. What do you know and what did you see that you can
677 tell this jury, about those brakes, that would indicate whether they were broke?

A. We had been switching with this engine all morning putting up coal and making stops, and in and out of the switches, and came up the main line, and it worked when we stopped in this smoke and steam, because the brake shoes applied to the wheels.

Q. When you looked to see whether the wheels were off the track, did that bring your attention to the wheels on the rail?

A. Yes sir.

Q. Did that bring your attention to the point where the brakes on the wheel would be?

A. It would.

Q. And can you state to this jury whether those brakes were up against the wheel and applied?

A. They were.

Q. Could you feel, or by any other manner know, when the brakes would be applied,—the air brakes upon an engine be applied,—could you know that from standing where you were on the engine. That is, you were standing here on this step?

A. Yes sir.

Q. Now assuming that these air brakes were applied to the engine to stop it, would there be any way, if you didn't see the brakes go up against the wheels, would there be any way you would know that the brakes were being applied?

A. Yes sir, from the fact that the engine began to stop.

Q. Well outside of that, would there be any other way that would indicate to you when the brakes were applied to the wheel?

A. There would if I paid attention, but I got off just before it stopped.

Q. Oh, you got off the engine just before it stopped?

A. Yes sir, it had not come to a dead stop yet.

Q. Were you around the engine in the yards at the time that Mr. Zimmer thawed the ice off of the air pistons, or the pistons
678 in the air chamber, at the point on the brakes?

A. I had not noticed him, I might have been in the switch *youse* getting warm.

Q. It was a cold morning?
A. Yes sir.
Q. But you understood from Zimmer that that had been done?

Mr. Rose: The plaintiff objects to that question as hearsay testimony.
Sustained. Exception.

Q. About what speed, or about how fast were you coming back on this track,—this main track, immediately prior to this, at the time of this accident, to Mr. Huxoll?
A. After I left the east end of the yards, we were going about five miles an hour up to the west end of the stock yards, and then I noticed this here cloud of steam and smoke and we slowed down to three or four miles an hour.
Q. When you came into that smoke?
A. Yes sir.
Q. How fast would you say that engine was going, at or about the time of the accident to Mr. Huxoll?
A. Three or four miles an hour.
Q. When you got off of the engine,—you got off while it was still going?
A. Yes sir.
Q. Now how fast did you run in going around the tender,—in going ahead of the engine, in going around the tender?
A. I didn't run very fast,—I didn't need to, it wasn't going very fast,—it stopped about the time I got to the rear end of the tank.
Q. About the time you got to the rear end of the tank, it stopped?
A. Yes sir.
Q. Do you know about where that grip that you noticed there in front of the pilot of the engine, between the tracks,—do you know about where that was with reference to the pilot of the
679 engine, on the spot track?
A. No, I didn't.
Q. You didn't pay any attention to that?
A. No sir.
Q. There was some excitement I presume on account of the accident, and the seriousness of it, up there?
A. Yes sir.
Q. Does the engineer, in switching there in the yard,—that is, take Mr. Zimmer at this time, and from whom does he get his direction as to where he is going or where he is to go in the yard?
A. From the yard master and the man who is following the engine.
Q. Well, in this instance, I am talking about this particular instance,—Mr. Zimmer coming from the east, backing up west, from whom would he get his direction as to where to go or where to stop?
A. Well according to signals.
Q. Well, were you the fellow giving the signals?
A. Yes sir.
Q. And he would go simply as you directed him?
A. Yes sir.

Q. And would he know from any other way excepting the directions that you gave him as to where he was going?
A. No, he would not.
Q. That is the way the work is done in the yards?
A. Yes sir.
Q. You get your directions from whom?
A. From the yard master.

Cross-examination.

By Mr. Rose:

Q. Then as a matter of fact you control-ed the movements of this engine on this track, did you?
A. By signals.
Q. Where were you going on this trip?
680 A. We were going up to what we call the lead, just west of the depot, and crossed over to number three track, and shoved some cars in the west leg of the Y.
Q. Would that take you across Rose street?
A. Yes sir.
Q. How far beyond Rose street?
A. Well the switch that leads into the lead, is a couple of hundred feet west of Rose street.
Q. Now you say you would not have operated this *this* engine regularly, if the air brake had been out of commission?
A. No sir.
Q. You would not have operated it upon any occasion?
A. No sir.
Q. And did not operate the engine?
A. No sir, but we weren't supposed to take an engine out there to switch without air, and take chances ourselves.
Q. You would not knowingly follow an engine that didn't have a power brake in efficient operation, would you?
A. I would not want to brake up some cars that way.
Q. Well I submit, for your own protection, would you go out as a switchman, separately, and follow an engine around that didn't have its power brake working?
A. No sir.
Q. And you would not go around knowingly and follow an engine in the yard, that didn't have the bell apparatus in working order, either, would you?
A. No sir.
Q. Or at least have a bell rope that you could move the bell with, you think that is right, do you?
A. I don't move the bell.
Q. Well, you would not follow an engine if you knew the apparatus for ringing the bell wasn't in commission, would you?
A. No.
681 Q. And I ask you if you would follow an engine in that condition as a switchman, would you knowingly follow the engine?

A. No sir.
Q. It would be dangerous to do that would it?
A. It would.
Q. What function would the bell perform that you as a switchman would be concerned in?
A. The bell, they are supposed to be on all engines, to be ringing, at most times, most generally, when there was a storm in the yard.
Q. What is it rang for, to give warning?
A. Yes sir, to go to some place where we can't be seen.
Q. But why would you be concerned as to whether the power driving wheel brake was in commission, or not, how would that effect your safety or anybody elses in the yards?
A. We are not supposed to work with them if they are.
Q. You are not supposed to work with them?
A. No sir.
Q. Well, would it make any difference to you as a switchman whether that device was in efficient operation or not?
A. It would.
Q. It would?
A. Yes sir.
Q. Would it effect your safety?
A. Yes sir, it would.
Q. You didn't know that at or about eight o'clock, that air brake was totally disabled for efficient work?
A. No, I didn't.
Q. And when you came up with the engine, from the first movements, that that brake was so that it would not take hold, you didn't know that fact did you?
A. I didn't.
Q. Did you see Huxoll on the track, before you hit him?
A. No sir.
682 Q. Before this engine hit him?
A. No sir.
Q. Did you look up the track to see if anyone was there?
A. I could not say.
Q. I asked you if you looked?
A. I was looking that way at all times.
Q. And you could not see the track, or any portion of it, at all times?
A. Not after we got in that smoke and steam.
Q. It did no good to look under those conditions from where you were standing,—you could not get any knowledge of any danger, to indicate it by any signals to the engineer?
A. Not when I could not see.
Q. So as you were operating him, the only way that you could tell of the presence of any obstruction on the track, was when you came against it?
A. It is true.
Q. You were the only switchman accompanying the engine, the only person about the engine crew, at that time?
A. Yes sir.

Q. And you weren't on the end of the engine?

A. No sir.

Q. You were on the steps that lead from the,—between the tender and cab?

A. I was.

Q. The coal box and the water tank were on the leading end from where you stood, were they?

A. Yes sir.

Q. What is the length of the coal box, and the water tank, on engine 213?

A. About 13 feet long, the coal box is.

Q. And how large is the water tank?

A. About 25 feet,—that is from where I was standing, clear to the other end.

683 Q. You were standing about forty feet from the,——

A. There is the water space under the coal tank,——

Q. You mean 26 feet includes the full length of the tank and coal box?

A. Yes sir.

Q. Then the steps where you stood were 26 feet from the leading end of the car?

A. Yes sir,—that there coal box is only between ten and eleven feet.

Q. Then in giving the signal which you gave to Zimmer, you acted upon a warning received from the jolting of the engine, which had previously run over something, or else jumped the rails?

A. I yelled at him to stop.

Q. Well, I say, you relied upon the sensation of movement, or jolting of the engine?

A. Jolting of the tank.

Q. That was what gave you the information that there was something wrong, upon which you gave the signal?

A. Yes sir.

Q. Now do you remember what service you had performed just immediately proceeding the Huxoll accident?

A. No, as to that I can't state, we were switching at the east end of the yard.

Q. About three quarters of a mile from the place of the accident, wasn't it?

A. Yes sir, it was all of that.

Q. Had you not put a caboose on the east end of the train, in the east yards, before you came up the main track, on this last trip, before Huxoll was injured?

A. I do not just remember, we might have.

Q. And wasn't the occasion of your slowing up, when you

684 got by the stock yards, the fact that an extra was due in there from the west?

A. I do not remember.

Q. Didn't you tell the engineer, that there was an extra due in there from the west, on that trip, and wasn't that the occasion of the engineer's slowing up when he got by the stock yards?

A. I do not remember of that?
A. Did you testify last May in this case?
A. Yes sir.
Q. Did you testify by deposition at Sidney also?
A. I did.
Q. I will ask you if on the occasion of your giving your deposition at Sidney, you weren't asked this question, in reference to this last trip, "Now Mr. Witness, when you were coming up from the east end of the yards, the morning of that accident, January 1st, 1911, where did you first stop?" and didn't you to that question answer as follows: "We put this caboose on the east end of the train in the east yards, and came up the main track, and slowed up at the stock yards" did you so answer?
A. Yes sir.
Q. Was the question then asked, "Backing up" and to that did you answer, "I said to the engineer, there is an extra due in here from the west, and we slowed up", did you so answer?
A. I might have said that, yes sir.
Q. Now there was snow on the ground there everywhere in the yards?
A. Yes sir.
Q. And a very bad storm?
A. Oh, it wasn't what you would call a bad storm, it was a storming, and the wind was blowing.
Q. And the wind was blowing so that you attribute your failure to know about the using of the torch to warm up the air brakes, to the fact that you were in getting warm?
A. Yes sir.
Q. When your duty to be outside, was not imperative, to be
685 in the yards there, you would be up roasting your shins at the furnace?
A. You bet.
Q. Did you see all the engineers that came from the wash room and locker room to the east spot track, in that yard?
A. No sir.
Q. It was no business of yours to watch to see how they went,—you were in the yards to work, weren't you?
A. A switchman, yes sir.
Q. And you were all over the yards?
A. Yes sir.
Q. And you do not know just exactly how the engineers and firemen proceeded from that room to the east spot track do you?
A. Why?
Q. From personal observation you do not know what course they usually took?
A. From what I have seen,——
Q. No, I asked you how many you have seen?
A. I do not know how many.
Q. Well you know that many went down there that you didn't see?
A. Yes sir.

Q. Every day and night?
A. Yes sir.
Q. You didn't work all night?
A. I didn't.
Q. That spot track was in use all day and night?
A. Yes sir.
Q. And there was a night switching crew as well as a day switching crew, kept busy in that yard?
A. Yes sir.
Q. And ordinarily the night crew would be the busiest crew, isn't it,—that is, there is more freight trains made up and moved out in the night there, than in the day time?
A. You ask the night crew and they will say the same thing, and ask the day crew, and they would say the same thing.
686 Q. Each of them thinks they all work more than the other fellow?
A. Yes sir.
Q. Was there any rule posted up directing the engine men which way to proceed to the east spot track?
A. I never noticed any.
Q. Did you ever see any placard posted along there, saying "This space is the path for the engine men to go from the wash house to the east spot track?
A. No sir.
Q. Was there any different make up of the yards at that point from what there was at other points, as far as the material for ballast and such as that is concerned?
A. No, it was all about alike.
Q. There was no paved concrete walk in there especially for the engine men?
A. No sir.
Q. Now Mr. Riggs, you say you are well acquainted with the ordinary methods of switch movements in the Sidney yards?
A. Yes sir.
Q. Are you pretty well acquainted with the movements in switch yards generally?
A. Yes sir.
Q. The principles under which switching is generally done over the country?
A. Yes sir.
Q. You know that the rules and customs of railroading are rather agreed upon by the operators of practically all the lines in the country?

Mr. Strode: The defendant objects to that question as improper cross examination.
Sustained. Exception.

Q. Well the rules are different in the Sidney yards, from what they are in other yards?
A. I do not know, I never switched in other yards.

687 Q. You never switched in other yards, and you do not know that there are different rules in operation in the different yards in this country?

A. No sir.

Q. Were the conditions in the yard as to the clearness or obscurity of the track, and as to weather and storm at the point where Huxoll received his fatal injuries, the ordinary conditions there, or usual conditions of the Sidney yard?

A. I do not exactly understand.

Q. (Last question read as follows:) Were the conditions in the yard as to the clearness or obscurity of the track and as to weather and storm at the point where Huxoll received his fatal injuries, the ordinary conditions, or usual conditions of the Sidney yard?

A. As I understand you, it was. At times they received this steam and smoke across this place, and it was more severe that day than I have ever seen it I believe.

Q. Then the conditions were unusual conditions weren't they?

A. Yes sir.

Q. It is not very often that you have to go through those yards in the middle of the day, when you can't get a chance to look out at the path you are going over, is it?

A. Sometimes it is, and sometimes it is not.

Q. Well is it a pretty frequent thing?

A. Not as bad as it was that day.

Q. Well, I say, is it so bad,—is it often so bad that you could not see the track ahead of you, when you were switching for any distance at all, any portion of the track?

A. Not very often.

Q. You can most always see the track in day light?

A. If it wasn't storming too bad.

Q. Well and you say you never saw such a bad storm and bad condition as this particular one?

688 A. Yes sir, I have seen worse storms than this one.

Q. Have you ever seen the smoke and steam conditions as bad as they were that morning?

A. Well I have seen,——

Q. Well I understood you to say when you testified a moment ago, that you had never seen it so bad before, what did you mean by that?

A. Smoke and steam.

Q. You never saw it so bad as that?

A. Not quite so bad as it that time.

Q. Now in a condition of that kind, where your crew consisting of your engine men, and at least the switchman that runs the engine, is called to go through a yard, where the members of the crew can't see the track ahead of them at all, and when it is snowy and stormy besides, and very cold, do you change the methods of switching operations or take any additional precautions on account of those unusual weather conditions in common and general practice in the Sidney yards?

A. No, we go slow in places like that.

Q. You go in the same way whether or not you can see the track or can't see the track,—and that is the custom in the Sidney yards?

A. (No answer.)

Q. Now the question is, whether your method of switching operations, or whether your movements undergo any change on account of those extraordinary conditions?

A. Oh we use caution for our own advantage, in bad weather, and smoke and steam.

Q. Ordinarily do you expect to be able to see what you are running into in switching operations. Do you expect to have a look out on the track as to what you are running into in ordinary switching operations?

A. I expect to see it, but if you are in a place where you can not see it, you can't see it.

689 Q. Well, I said ordinarily, do you expect to be in a place where you can see the track,—where you cannot see the track ahead of you, so that the thing you run into, can't be seen?

A. If it is clear, yes sir.

Q. Either in day or night?

A. Yes sir.

Q. Ordinarily you have a switch engine with a headlight on both ends?

A. Yes sir.

Q. To give you a view of the track, which ever way your switch engine is going?

A. Yes sir.

Q. Now in cases where the track is obscured, by smoke and steam, and fog, don't the night rules obtain in switching in the Sidney yards?

Mr. Strode: The defendant objects to that question as improper cross examination.

Overruled. Exception.

A. The rules are the same at day and at night.

Q. And you say on oath as a man of experience in switching in yards, that the rules governing your movements for day rules and night rules are absolutely identical?

Mr. Strode: The defendant objects to that question as improper cross examination.

Overruled. Exception.

A. They don't use the head lights in the day time or lanterns to switch with.

Q. Now in those respects if you have a condition of fog that makes it dark, don't the switching rules as they obtain and are practiced in the Sidney yards, require you to use lanterns and headlights in the day time, on account of the fog, the same as if it was night?

A. I have never seen it so dark, at any time that you couldn't see signals.

690 Q. Well, don't you know what the rules are in cases of that kind?

A. No sir.
Q. Don't the rules require you to use night signals where there is a fog so dark that you can't see in the day time?
A. I never seen it do quite that,——
Q. I didn't ask you that. I asked you in those conditions when it became dark, in the day time, if you didn't have to use the lights the same as if it was in fact, night?
A. No sir.
Q. You know there is a printed rule to that effect, don't you?
A. No.
Q. Now I want to ask you if when you approach this place where Huxoll met with his accident, and where you say it was so dark that you could not see any portion of the track, did you use lights for signals or did you use head lights on your engine?

Mr. Strode: The defendant objects to that question as assuming something that the witness has not said.

No ruling.

A. (Not answered.)
Q. There was nothing the matter with your eyes that day?
A. No sir.
Q. Your eyesight was good at the time of this accident?
A. Yes sir.

Mr. Rose: I press the question to which Mr. Strode objected.

Q. (Question read as follows:) Now I want to ask you if when you approached this place where Huxoll met with his accident, and where you say it was so dark that you could not see any portion of the track, did you use lights for signals or did you use head lights on your engine?

Mr. Strode: The defendant objects to that question as assuming something that the witness has not said. The witness has not used the work darkness.
Sustained. Exception.

691 Q. Now at the time of this accident, did you have any headlight on the leading end at the time of the accident that you could have lighted,—engine 213?
A. No, but then,——
Q. Just answer the question "yes" or "no?"
A. I never noticed whether or not there was any upon that engine or not.
Q. You don't know about it, whether or not that engine had two head lights such as the ordinary switch engine?
A. Not two headlights. It might have had a lantern up there.
Q. Did it have a lantern up there?
A. I don't know.
Q. Do you have an ordinary lantern as a headlight,—did that give any help in operating the train?

Mr. Strode: The defendant objects to that,——
Mr. Rose: I don't care about it.

Q. Now Mr. Riggs, assuming the conditions as you yourself have described them, that you were backing up with engine 213, through the yards at Sidney on the main line, and had no head light on the leading end, at about 11 o'clock in the forenoon, and the track was so obscured by smoke and steam and fog and drifting snow that not a single member of the engine crew or switch crew could see any portion of the track looking towards the leading end of the engine: What are the acts of precaution that you take according to the way of doing business, moving in switchings in the Sidney yards, to protect yourselves against possible collisions, and dangers?

Mr. Strode: The defendant objects to that question as not confined to an examination of what was actually done, and the practice was. The witness is asked in the question to specify what he would do. The examination of the witness was on the proposition as to what was the practice and what was done.

692 The Court: Confine it specifically to the witness. I will sustain the objection. Exception.

Q. Mr. Riggs, on January 1st, 1911, what was the rule of operation obtaining in the Sidney yards, in respect to the movement of an engine backwards on the main track, under severe weather conditions, when the track over which the engine was backing, was so obscured that no member of the engine crew or switching crew could see any portion of it, and where there was no headlight on the leading end of the engine?

Mr. Strode: The defendant objects to that question unless counsel mean by the use of the word rule, the practice in the yards. This witness wasn't examined on the printed rules of operation, but was examined on the actual practice in the yards.

Mr. Rose: This looks to me as if this objection is put in here because the counsel is afraid to have this witness taken over this kind of a fire.

Mr. Strode: I object to that as misconduct and improper, and ask the court to direct the jury that such statements are improper in court and should not be considered, and to direct counsel that it is misconduct. I want to submet to the court that this objection is not captious, and that it was made for the reason that I had not examined Mr. Riggs upon the printed rules. I do not know whether or not he has studied the printed rules. I put him upon this witness stand to testify as to what they did there day by day since 1905, and the examination is open to that for any examination they want to pursue as to what was actually done, but to ask him as to what the printed rules were, I object to that as not within the scope of the direct examination. I say that if counsel means by the use of the word rule, that was the actual practice, and is not restricting that term to the printed rules, that have been offered, there will

693 will be no objection to the question.

Mr. Rose: I will say that as far as the expression of "taking the witness over the coal" I don't want any prejudice about that, and I don't want any expression of that kind to affect the jury, and I

will say frankly that if there is any fault in that expression I want the court to correct it, and wish that the court would. As to the further question regarding the merits of the objection, I insist that the objection on its face is too narrow for serious consideration and I ask the court in its discretion not to confine me to the use of the term, that the counsel for the company has examined on.

Objection overruled. Exception.

A. There wasn't no rules to operate an engine in the yard service, and as to head light, if they haven't got a head light burning by night, they use a lantern, and in day light it is not necessary to have headlights.

Q. Have you completed your answer?

A. That is as far as I can understand that question.

Q. Now in the conditions in which I have stated, you may explain what are the additional precautions you use in view of the unusual conditions. You say you were to use the same extra precautions?

A. For our own safety.

Q. Well, explain what you mean,—what could be extra caution?

A. To go through the cloud of steam or smoke, we proceed slowly.

Q. That is all you say?

A. Yes sir.

Q. There wasn't any other precaution?

A. No sir.

Q. Upon what did you rely to protect the engine or yourself or any person that might be about the tracks, from the danger of collision?

694 A. All other trains or engines is supposed to protect against the yard engine in yard service in the yard limits.

Q. That is what you relied upon?

A. That is what I always relied upon, yes sir.

Q. Suppose one of the members of your own crew was there and had not seen your signal and did not know where you were moving, would you take any care of him at all, or run over him and then stop the engine after running over him?

A. Anybody with good sence would not come down the middle of the track and get run over.

Q. I want to know how you make the movements of your engine safe when you have no view of the track, and nobody ahead, to warn, and no flagman ahead to call to you, if there is any danger encountered,—how do you protect yourself from collision in case of that kind?

A. We go through, guarding ourselves.

Q. Well, how do you guard yourselves?

A. Go through the smoke and steam slowly.

Q. Then you go just slowly, and don't have any other guard, is that it?

A. Yes sir.

Q. And in all conditions of that kind, in your customary switch movements in those yards, when you can't see at all what you are

getting into, you move the engine just the same, and when you find you have had an actual collision is when you stop?

Mr. Strode: The defendant objects to that question as assuming something that the witness has not said, and unfair to the witness.

Sustained. Exception.

By Mr. Strode:

Q. What kind of engines were used in that yard for switching purposes since 1905, that you know were used there for that purpose.

A. What kind of engines?

695 Q. What different kind of engines, the different kinds that were used, if different kinds were used?

A. There was the 16 hundred type, we had several of them.

Q. What kind of a type is the 1600 type, compared to this 213?

A. They are used as a road engine, and they still use the road engine. They have square tanks.

Q. They have square tankes instead of the round tank?

A. Yes sir.

Q. But outside of that, how did they compare with this engine 213, in other respects,—the sixteen hundred type?

A. They have the same number of drivers and the square tank.

Q. About the same sized engine?

A. Yes sir.

Q. About the same weight?

A. I think so.

Q. The fact is, isn't it, Mr. Riggs, that the ordinary road engine, has to do in the course of its work, as much or more switching, than the switch engine in the yards?

A. Yes sir.

Q. They usually work both ways?

A. Yes sir.

Q. It has not only to pull the train, but it has to tend to the switching as it goes from station to station?

A. Yes sir.

Q. Do you know what is the practice in switch yards with reference to the use of the tracks, whether those tracks are used by the engines and cars, and not made use of by the switchmen and people in the yard, in walking between the rails?

A. (No answer.)

Q. I don't know whether or not I got that so you will understand. What I mean is this. In switching in the yard, do you assume that as far as the track is concerned, that that track is for the use of the engine and cars?

A. Yes sir.

696 Q. And that a way is provided on the outside of the track for those who are working in connection with the switching, for walking in their work,—or about their work?

A. Yes sir.

By Mr. Rose:

Q. Isn't it a fact that the rule as to clearance of tracks, is to

make room for the clearance of cars, which are to pass, and that the tracks are laid with the interests of cars and trains in view?

A. Yes sir, and anybody standing between the cars and trains.

Q. Well the distance that clearance is made, that refers to what is reasonably appropriate in the passage of cars?

A. Yes sir, and the switchmen between.

Q. Do you mean to say that they make it safe for a switchman to stand, while they are passing, between two trains?

A. I have stood there with trains passing.

Q. No, but are they planned with reference to that?

A. I do not know whether or not they are planned with reference to that, or anybody else to walk between trains.

Q. Now with reference to what type of engines are usually assigned to switching service, do you mean to be understood that engines assigned to switching service are the ordinary road engines in common and general practice?

A. They have yard engines for yard service.

Q. But they have yard engines for yard service?

A. Yes sir.

Q. As a matter of fact, the switchmen have an agreement with the companies as to the equipment of engines, don't they?

Mr. Strode: The defendant objects to that question, unless it is confined to the Sidney yards.

Mr. Rose: That is an agreement that includes every yard in this country.

Sustained. Exception.

697 Q. Aren't the types of engines assigned to the switching service in the Sidney yards, governed by the general contract existing between the switchmen and the Union Pacific Railroad today, and haven't they been for years?

Mr. Strode: The defendant objects to that question as improper cross examination.

Overruled. Exception.

A. I don't know.

Q. How long did you say you had been a switchman.

A. Since 1905.

Q. And you don't know whether your association has an agreement with the road governing the manner in which all engines assigned to the switching service shall be equipped you say you don't know there was any such agreement?

Mr. Strode: The defendant objects to that question as immaterial.

Overruled. Exception.

A. (No answer.)

Q. You don't know anything about any such agreement?

A. No sir.

Q. Can you produce a printed copy of the agreement that is carried around by every switchman on the Union Pacific road?

Mr. Strode: The defendant objects to that question as misconduct

on the part of counsel and improper and an attempt on the part of Mr. Rose to inject in here his own statement, and to have it considered as evidence, when the fact itself would be excluded, and when the witness has already testified that he knew nothing about it.

Sustained. Exception.

Q. I will ask you then to not assume the fact at all,—if you have any knowledge as to whether an agreement governing that matter between the road and the switchman has in printed form been generally distributed?

698 A. No sir.

Q. You have no knowledge of that kind?

A. No sir.

Q. Are you a member of any organization of switchmen that deals through its orga*in*zation with the Union Pacific road?

A. No sir, not of switchmen?

Q. Are you of any other kind?

A. No sir.

Q. So if such an agreement exists, you would not get it, because you are not a member of the society, is that what you mean?

Mr. Strode: The defendant objects to that question as immaterial.

No ruling. No answer.

Q. Now let me ask you this question, if it is not true in common and general practice in the yards at Sidney, that all switch engines assigned specially to switching service shall be equipped with head lights, foot-boards and grabirons on both ends?

A. The regular switch engine, has foot boards and grab irons.

Q. On both ends?

A. Yes sir.

Q. And head lights on both ends?

A. Yes sir.

By Mr. Strode:

Q. And the other kind that are used in the yards, are the kind that are shown here,—such as 213?

A. Yes sir.

Q. You have testified here, to what you have observed in actual practice in switching in these yards in Sidney, since 1905?

A. Yes sir.

Q. You don't claim to be an expert on rules or written agreements?

A. No sir.

Witness excused.

699 W. A. Borton, recalled as a witness for the defendant testified as follows upon examination

By Mr. Strode:

Q. You are the Mr. Borton who testified earlier in this case for the plaintiff?

A. Yes sir.

Q. Were you acquainted with the practice observed and pursued in switching in the yards at Sidney, on and prior to January 1st, 1911?

A. Yes sir.

Q. I think you stated you were the yard master?

A. Yes sir.

Q. And how long have you been employed prior to January 1, 1911, in and about the yards at Sidney?

A. I went there the first of March, either 1908 or 1909 but I believe it was 1908.

Q. And were you employed continuously there from 1908 or 1909, to January 1st, 1911, about the yards?

A. Yes sir.

Q. And to what extent had you observed the operations of the switch engines in the yards at Sidney during that time?

Mr. Comstock: The plaintiff objects to that. As I recollect, that is a repetition.

Mr. Strode: Were you examined about the custom and the actual practice of switching in the yards, as to whether a flagman was sent ahead or on the front end of an engine in case of steam and smoke?

A. I don't believe I was. As to a man being sent ahead.

Q. To about what extend did you observe the operation of the switch engine in the yards at Sidney from the time you went there, in 1908 or 1909, until 1911?

A. I was in charge of the work there, and with the engine the biggest part of the time on the day shift.

Q. And what would you say, that you were acquainted with the actual practice in switching in the yards at Sidney, prior
700 to and on January 1st, 1911?

A. Yes sir.

Q. What was the practice or custom with reference to having a flagman or a switchman on the front end of an engine in switching in the yards,—on the leading end of the engine, in order to flag the engine through steam or smoke or storm?

A. We never put a man there for that purpose, it wasn't necessary.

Mr. Comstock: The plaintiff moves to strike the last portion of the answer "It wasn't necessary, as not responsive, and a conclusion of the witness.

Sustained. Exception.

Witness excused.

701 Mr. Strode: The defendant will offer in evidence Exhibit 13 and 14, being pictures of engines, and a blue print of an engine.

Mr. Rose: I do not think we will object to either one of them.

Exhibits 13 and 14 received in evidence and shown to the court

and jury and copies of the same or the originals are hereto attached and made a part of this record.

Mr. Rose: The plaintiff offers in evidence Exhibit number 9.

Mr. Strode: The defendant objects to the offer as incompetent, and no proper and sufficient foundation laid.

The Court: If there is another view of the engine in, I will sustain the objection. Exception.

Exhibit nine to which objection has been sustained hereto attached.

Mr. Strode: The defendant offers in evidence Exhibit 16, being the statement of the earnings of Mr. Huxoll from January 1908, to the close of December 1910, in connection with the stipulation.

Mr. Hoagland: The defendant objects to the offer as immaterial, and does not make objection to the foundation, for the introduction of the testimony, or the manner in which the proof is made, of the facts therein stated. The stipulation being made for the purpose of saving the necessity of bringing the books and records here to prove the statements made.

Mr. Hoagland: It is stipulated that prior to August 1910, that the items of compensation therein stated in the exhibit, were to the deceased for the service as a fireman and extra engineer, he having been promoted to engineer prior to the time stated, in the exhibit, and thereafter when there wasn't an engine for him to run
702 he worked as fireman and drew fireman's wages. That begining with August 1910, he worked and drew compensation therein stated as a regular or as a locomotive engineer running a regular engine on a regular run.

Mr. Rose: With that stipulation, I will agree that the exhibit may be received.

Exhibit 16 received in evidence, read to the court and jury, and the same is hereto attached and made a part of this record.

Mr. Strode: The defendant now rests, asking for the privilege of introducing any further testimony upon some point that may have been over-looked in the course of the presentation of the evidence upon behalf of the defendant, which however would not be extended, but we do not want to be confined however to some overlooked point, and I will say that the other-side, as far as we are concerned can have the benefit of the same proposition.

Mr. Hoagland: It is stipulated that the wages of a regular engineer in accordance with the mileage made, and the amount of work required, run from 150 to 200 dollars per month.

Defendant rests.

703 *Rebuttal.*

ELLA HUXOLL, recalled by the plaintiff testified as follows upon examination by Mr. Rose:

Q. Did you have a conversation with Mr. Dupont who testified here in this trial yesterday, on the subject of how your husband re-

ceived his injuries, on or about the third day of January, 1911, at your home?

A. I did.

Q. You may state whether in that conversation speaking of the subject matter of the accident, Mr. Dupont stated to you "I yelled to Fred, I heard something,—just then I was knocked down" or that in substance?

A. Yes sir.

Q. You may state whether or not Mr. Dupont at that time and place, stated to you, that he could not see your Husband Fred Huxoll, or that in substance?

Mr. Strode: The defendant objects to that. Mr. Dupont when this question was read to him I think,—I am not obsolutely certain,—my impression was that he did not deny anything that they claimed that he said to Mrs. Huxoll.

Mr. Rose: Except that he didn't remember of saying that he was knocked down.

The Court: That is his testimony.

Mr. Rose: He says, "I don't remember I told her I did not see Fred."

Mr. Strode: If there is any question about it, I think you are entitled to that question.

Q. You may state whether or not in that conversation, Mr. Dupont tole you that at this time he didn't see Fred, or words to that effect?

A. No, he didn't mention anything about seeing Fred, he said that he was ahead of Fred.

704 Q. What did he say as to whether he had seen Fred or whether he could see him?

A. No, he said he didn't see Fred. I guess he was just lost,—they were in steam or smoke and he didn't know where he was and he didn't know where Fred was.

Q. Was that what he told you?

A. Yes sir.

Mr. Strode: The defendant moves to strike out the last two answers for the reason they are incompetent and not proper examination on an impeaching question, and ask leave to court to submit an objection before the answer is made, and for the further reason that the answer was made while counsel's attention was directed away from the question.

Sustained. Exception.

Cross-examination.

By Mr. Strode:

Q. Mr. Dupont came to your home?

A. Yes sir, I asked to see him.

Q. And he came there to see you?

A. Yes sir, I wanted to hear as much as I could about the accident.

Q. Did you have this typewritten memoranda prepared at that

time or was it prepared,—who prepared that that has been referred to here?

A. I do not understand you.

Q. Mr. Rose refers to a typewritten memoranda,—you notice this typewritteen memoranda that Mr. Rose was reading from?

A. I do not understand what you mean.

Q. Well Mr. Rose has here, a little typewritten paper that he read from to you, and read from to Mr. Dupont in asking these questions of you and in asking the questions of Mr. Dupont, you have noticed that, haven't you?

705 A. Yes sir.

Q. Well, what I am inquiring about now, is when that was prepared, and by whom,—and who wrote up that typewritten sheet that Mr. Rose has?

A. My sister in law and I were just sitting there. I could not just remember, and so she just wrote it down for me, so that I could have it clearer in my memory.

Q. It was written down with pen and ink?

A. Well she is a stenographer and she wrote it at home for me.

Q. I didn't understand that Mr. Dupont disputed anything you say about this, excepting on the point as to whether he was knocked down?

A. Well, Mr. Dupont stated to me,——

Q. No, I am asking you the question as to whether he said that he was knocked down. That was the point that he and you didn't quite agree upon. What I am trying to get your attention to is that: Are you clear that Mr. Dupont said that he was knocked down?

A. Yes sir, I am. He said, "I was knocked down and my grip was knocked out of my hand at the same time."

Witness excused.

706 ERNEST T. TRAMP, recalled by the plaintiff, testified as follows on examination, by Mr. Rose:

Q. Did Mr. Paul J. Dupont at your place of business in North Platte, on or about the fourth day of January 1911, in speaking of the accident to Mr. Fred Huxoll state "Fred look out I hear something, but at the same time I was struck and knocked down and when I gathered up my grip, Fred was run over," or that in substance?

A. Yes sir.

Q. Did he further say to you in that conversation in answer to an inquiry from you as how it happened, that you were not hurt when you and Fred were together. "Well, Mr. Tramp. I don't know. There was such a storm you could not see your hand before your face."

A. That was his answer.

Witness excused.

707 Mr. Rose: In connection with the notice and filing marks and certificate of the deposition which we exhibit to the court, we offer in evidence questions 68, 69, and 70 and the answers,

of the deposition of Mr. Roscoe Zimmer, taken at the office of H. T. Doran in Sidney, on the 28th day of June, 1912.

No objection.

Reads as follows:

Q. Do you think you were about opposite the water crane when you heard this noise?
A. No, I think we were a little west.
Q. Were you looking out when you was running the engine, in the direction in which you were going?
A. No sir.
Q. You could not see?
A. No sir.

Mr. Rose: Then in connection with the notice and certificate of the officer taking the deposition, we offer in evidence the following question and answers in the deposition of Paul J. Dupont taken at Omaha, February 26th, 1913, on page 19.

Mr. Strode: The defendant objects to the offer as incompetent, and not tending to impeach the witness's testimony.

Overruled. Exception.

(Reads as follows to the court and jury:)

Q. Did you continue on east then?
A. Yes sir.
Q. And did you turn around several times?
A. No sir.
Q. Did you turn around any from the time you started east until the engine came by?
A. No sir.

708 Q. Now when was it that you first turned around after you went east from the turn table?
A. After engine number 213 knocked my grip out of my hand.

Mr. Rose: Now I offer in evidence the last question on page 7, and the answer thereto, found at the top of page 8, from the same deposition of Paul Dupont.

No objection. (Reads to court and jury as follows:)

"Q. With reference to that water crane, where did number 213 hit Mr. Huxoll?
A. About 10 to 12 feet west of said water crane."

Plaintiff rests.

709 Mr. Strode: I want to make a further offer from Dupont's deposition as bearing upon the very same subject inquired about, and with respect to which these answers have been offered in evidence.

Mr. Rose: The plaintiff objects to that exhibit as the specific questions are put in evidence as impeaching questions in answer to a foundation laid. The testimony of Mr. Dupont who was pres-

ent here in court, is in, and the deposition is not competent under the statute when the witness is present.

The Defendants can't use this evidence, they having introduced the witness upon the stand.

Sustained. Exception.

Mr. Strode: Now from page eight of the same deposition containing the question and answer propounded by counsel for the plaintiff, we offer the following questions and answers from the deposition of the Witness Dupont, as bearing directly upon the question of when he turned around and notified Mr. Huxoll that the engine was coming.

Mr. Rose: The plaintiff objects to the offer as incompetent and irrelevant and immaterial.

Sustained. Exception.

Plaintiff rests.

Defendant rests.

The Court: The instructions shall be presented before the arguments open at 9 o'clock in the morning.

Mr. Strode: The defendant excepts.

710 10:30 A. M. October 23rd, court met pursuant to the adjournment, taken the evening before, and the following arguments of counsel were delivered to the jury.

Argument of Mr. Comstock, on Behalf of the Plaintiff.

Gentlemen of the Jury: This long tedious trial is now nearing a close. The last stage of the controversy is now on. This gentlemen, is an important case; perhaps as important a case as any case ever submitted to a jury. It demands your careful, and candid consideration, which I know it has received so far, and will receive to its close. On the one hand, is this woman, and these little children, —not begging, not asking for charity; not asking for any donations; but making a demand in the interest of justice, for what is rightfully theirs. And for which, and to recover back, that which this railroad took from them. As these little innocent tots tramp back and forth in your presence, they little realize, perhaps not at all, the awful importance of this suit to them, and that the greatest incident, the incident of greatest moment so far in their lives, and perhaps the greatest from the cradle to the coffin, is now being weighed in the balance and you gentlemen are holding the scales.

This suit, gentlemen, is brought under the act of congress, of the congress of the United States, for the protection of railroad employees. Let me first call your attention to the provisions of this act, and under what circumstances a recovery is given. This act provides that all railroads engaged in Interstate Commerce.—This is one; it is admitted that it is one; the judge has told you as a matter of law it is one.

That question is eliminated. It is a common carrier engaged in the transportation of Interstate Commerce. It is, then, under this act, responsible for injury or death. It is responsible under
711 this act of congress for an injury or a death that resulted in whole or in part from the negligence of any of its officers, agents, servants or employees, or on account of its negligence, in its care, *care,* engines, appliances, machinery, track, road bed, or other equipment. That statute means, gentlemen, that if any officer, agent, or employee, of this railroad, is guilty of any negligence that caused, or contributed to cause the injury complained of, this railroad is liable. That act further provided that if on account of the negligence of any of the officers, agents or employees, of this railroad, any of its equipment, its cars, brakes, track, or its engines, were defective or out of repair by its negligence, on account of that fact, an injury or death results, not entirely from it, but in part from it, it is liable. There is another act his honor called your attention to, in the instructions, that provides,—the Congress of the Government of the United States has passed this law. That provides that every railroad operating in Interstate Commerce, shall equipp its engine with a power wheel brake. And *juder* this other statute if it has not such brake in operation, then it is liable.

Now gentlemen, this is the statute upon which this suit was based. This is the foundation of this procedure, that gives this widow and these children a right to demand of this railroad company, compensation for the loss of her husband, if his death resulted in whole or in part from the negligence of its agents, servants or employees, or from its negligence in maintaining its equipment, cars, brakes, and so forth. Now gentlemen, what is negligence. His honor told you, you will remember it: it is doing something that an ordinarily prudent man, would not do, or it is the failure of doing something which an ordinarily prudent man, would do under the circumstances and under the situation that presents itself at the time of the
712 performance of the act, or omission to act. Now that is negligence. It is not difficult to understand it. In other words, it is the absence of due care. And what is due care? It is the conduct of an ordinarily careful and prudent person under the circumstances. You see there is no difficulty about that. Now gentlemen, with these preliminary observations, let us proceed to a discussion of the facts to determine whether or not this railroad company is negligent.

But gentlemen, at the outset, it seems almost a needless task,—the intelligence that I see reflected from the countenances of you gentlemen, tells me that you need not discuss that. But nevertheless there will be skillful counsel to follow me, and I presume they will crack coarse jokes at many of my imperfections, and they will argue with keenness and shrewdness, these propositions, and for that reason and for that alone, I must go over our case in the outset, and I will afterwards make some observations on the proof to establish this negligence. In the first place, I want to call your attention to the condition surrounding these yards, and surrounding this scene, because the definition of negligence always contemplates the taking of that into account, and due care in one situation may be a crime under

other circumstances. Negligence under one situation may prove to be care under other circumstances. Let me just detail to you the situation in that yard. In the biting cold of 15 degrees below zero, with a strong gale blowing from the northeast, or the northwest,—I do not know which way, and I do not know as it is very material. With snow in the air, and several inches of snow on the ground, with steam and smoke coming from that roundhouse, and the fifteen or twenty engines that they said were there, so obstructing the view, that gentlemen, the witness they brought here clear from Missouri said it was so dense that he could not see his hand before his
713 face. In that situation, an engine passing through there at the rate of speed that it could safely pass in the open sun light of the day, was merely a crime. Now this switch engine,—I do not have to take his evidence alone,—but here sat this man Nicholson, near the water crane, that never saw this switch engine pass, or heard it pass, when he sat or stood within a distance that he could have touched it with his hand. This man, working on the engine there, standing 12 feet from this track, never saw it or heard it pass, and the man who came from Missouri, Mr. Dupont, never saw that engine, until it struck the grip that he carried in his hand. I will just put this to you to show the situation and the surroundings.

This poor benighted servant of this great railroad, when he was on his way, to carry its commerce across the land,—guilty of negligence,—what did they do. Coming into that awful situation, what did they have. They had an engine that had a brake that it could not control it with. But they say, Matthews said that. He did say it, and he is the man, that never could get here to look you in the face. He did say it. And they will tirade probably against Matthews, and use every influence against him, possible to make him discredited, and disbelieved, but we do not have to rely on that. Their own engineer told you that. He told you that at eight o'clock in the morning, that brake,—he told you that the first stop he made that morning, he noticed that brake did not work, and he went back there and thawed it out. Didn't he corroborate Matthews. They laughed at Matthews' testimony that these pipes or some of these arrangements would be so effected by cold weather that it would effect the brake, but when we put that man Finch on the witness stand, corroborating him, what did they do. They thought it was necessary to send to Omaha and get their air expert and to go down to the Burlington Railroad and get their expert, and put them
714 through a course of examination here, lasting almost a day, and what did they do? After they did it, they corroborated Matthews, and Finch: both of them. They said, the extreme cold would so effect them that they would not be effected in their operation, unless what? Unless the utmost care was taken. Here came this engine, clear in from Cheyenne running all night in that terrible cold. Nobody said they drained the cylinders on the way. Everybody admitted that water would accumulate in those cylinders, and gentlemen, it does not require any proof to you that water will freeze in a temperature of 15 degrees below zero. Now those cylinders were perhaps two thirds full of water, and frozen up, and he never got them thawed out, and never thawed out the cylinders, as

Matthews said, when that engine was coming down through that steam and smoke. That the only power to control it was the reverse lever.

Now they brought men here, to say the brakes were such that they could release them. You and I might have stood there with our foot, and pressed against those brake shoes, and had power enough to press those brake shoes against the wheels with sufficinet pressure to pinch a finger if you had it there, but what pressure would that be to these pondrous wheels. They took them off, and they didn't bring an inspector here, or anything of that kind, to tell you that the brakes were absolutely in efficient order to hold that engine, until after these brakes, were off,—no inspection was made for that purpose, until after these rods were gone. So that the evidence of their own engineer, the man, above all others in the world, who would use every means to excuse himself for this almost murder, would say if he could,—he would deny that the brakes were out of order,—he would deny that he ran the engine in there with the brakes not under control,—so that as he says, that the only way that he would know there was something on the track was when they were stopped
715 by running into something in that cloud. He put it as strong as we could, and yet when he looked at the helpless innocence of these beautiful children, with uplifted hand to almighty God, he told you Gentlemen, that the engine that he drove ruthlessly over the form of Fred Huxoll had no brake with which he could control it. Oh gentlemen, is that due care, or is it negligence. But that is not all: Why gentlemen, even if you doubted the statement of Matthews, that it was out of order, and even if you doubted the statement of Zimmer, that it was out of order, the circumstances that Zimmer testifies to would be sufficient to condemn that brake. What does he say? Oh, think of it gentlemen: When it is called to your attention. He says, that the engine was proceeding through that smoke and steam,—no night ever has been so dark to obscure the view like that steam and smoke, according to the uncontradicted evidence in this record. He was coming through that steam and smoke at the rate of what,—why three or four miles an hour. Think of it,—three or four miles an hour. Somebody hollered, "Stop, there is a man under you." Now gentlemen, would that be an occasion that would call forth the emergency appliance, or would that call forth the application of an appliance that gradually slowed down the engine. Which would it demand, in the interests of humanity. It would demand the most instantcanous appliance of the most powerful device they had, to stop it instantcanously. What does he tell you? That he applied the air with all the haste and speed that he could. What does that do? Oh God, if his answer didn't condemn that brake to the scrap heap, I do not know what it did. What did he say? "I felt it commence to slow down." With a power brake applied to those massive drivers an engine going three miles an hour, I felt her commence to slow down. And he ran seventy-five feet after that notice was given.

Mr. Strode: I except to that statement. If the court please, that

statement is contrary to all the testimony. The statemer
716 just made by counsel, that the engine went seventy-five fe
after the signal was given, is contrary to all the testimony i
this case.

The Court: He has a right to draw his inf-rence touching upo
that.

Mr. Strode: Where there is no conflict in the evidence, and h
makes that statement, that the evidence shows that fact. He ha
a right, I concede to draw on his imagination, but not to misrepr
sent the evidence.

Mr. Comstock: The evidence shows that an engine is about 7
feet long, and that this engine ran an engine length.

Mr. Strode: I objected to that statement. I objected to tha
portion of the counsel's statement that this engine ran 75 feet, afte
that notice was given as g-eing a mis-statement of what the evidenc
shows in this case, and contrary to all of the evidence in the case
and an unfair statement of the proofs on that.

Mr. Comstock: Will you tell the jury just how far it did run.

Mr. Strode: You can tell them.

The Court: Proceed with the argument.

Mr. Comstock: My candid recollection of the evidence is tha
it ran an engine length. That is what they did say. Let's argu
that out and see whether my friend is candid or see whether he i
attempting to dissemble or defraud again.

Mr. Strode: I except to that last statement as unprofessional, un
fair, and misconduct. I haven't dissembled and I haven't de
frauded, and no gentleman will accuse me of that, and have tha
statement go unchallenged in court or out of court.

The Court: Proceed.

717 Mr. Strode: I would like,——

The Court: Overruled. Proceed Exception.

Mr. Comstock: Let's take the proof. Well, the man Borton, the
yard master, said he was hit fifteen feet west of the water crane,
that is the first place that he sees the impression in the snow, and
where was he when he came out. He said he was seventy or seventy-
five feet west of the water crane. So that it dragged him sixty feet.
And the front end of the tender according to the undisputed evi-
dence, struck ahead of him when the engine stopped, and Riggs said
he called to him just as he reached the tender.

Now figure that out if that does not make it, an engine length:
besides some witnesses said it was an engine length, and I think it
was Riggs. Now think of that, Gentlemen. With an engine going
three or four miles an hour, you know, and I know, and he knew,
that those great massive power brakes, if they are applied, properly,
would stop the engine going three or four miles an hour, in three
feet, if they went on right. Supposing you were riding in an auto-
mobile, with a concern attached to it, that you could not stop it
with, within forty feet, going four miles an hour, I would submit
it to the man himself, if he should not be in jail for having a con-
cern that he could not operate with more saf-ty than that. Here
was a man running a great machine that would crush a live out

of a person, and destroy their limbs, and destroy property, without any concern that he could properly stop it.

Now, that is just one of the many things. There is this engine. This was not a switch engine. They all admit that. It was a road engine that came clear in from Cheyenne, Wyoming, hauling freight on a freight train, broken, defective and out of repair, when it came in, as shown by their own reports, and when the engine went out, nobody has told you it was improved. It didn't go
718 to the round house for repairs. It has been told to you that there aws a leak somewhere. Zimmer claimed that it leaked somewhere, and ran down on this piston rod, or these piston rods, and that is what it did. That is what froze it up. Did he say they repaired it? Why, according to the evidence undisputed, it ran through that steam and cold from 8 o'clock in the morning until after 11 o'clock, with that leak still dripping down. Would it freeze under a temperature of fifteen degrees below zero. Do you suppose those brakes were in any better condition after it had been subjected to that drip, in that terrific cold, for five or six hours. Do you suppose the condition is improved any by that. Gentlemen, they can tirade against Matthews until they are black in the face, but he told the truth about that, because it is corroborated by Finch, by Wheeler, and by Mars, and by Zimmer.

Then again, this engine wasn't a switch engine. Zimmer told you that the rules and regulations of the Sidney yards, and all railroads generally, at the time that Huxoll lost his life, required an engine used in the yards for switching purposes, to be equipped with a head light, on each end, and a foot board on each end. They admit that this engine had no foot board on either end, and no head light except on one end. And, yet in that awful storm, and in that cloud of steam and smoke, they rushed onto this poor man, going to his death, with an engine equipped as that one was. Was that due care? Gentlemen, can they with all their keenness,—can they make you believe that is the conduct that an ordinarily careful and prudent man should exercise.

Their own rules say that in all cases of doubt, take no chances, and yet they took a chance. At the loss of a human life. There was a custom and practice in that yard to have a foot man or a switchman riding on one of these foot boards. Tell me pray, gentlemen what they are there for. They say it should be there and they say the rules of thier company require them to be their.
719 What are they there for. They are in the way, except as a place for men to be. It required that the switchman should ride on the leading end of the engine through the yard. To give signals to the engineer to control the movements of his engine, and give warning to persons on the track. Did they have any there? No, they had him hid in the gangway. Tell me, gentlemen, is that due care? Can they wipe out of this record that that is due care? That that is the conduct of an ordinarily careful and prudent man? Riggs told you himself, that the could not see the tank of that engine. Zimmer said, "I hung out of the window two thirds of my length perhaps, or less, but I could not see the

hank of my engine, and yet,—now what would have been the result if they had had a man on that foot board there? Going along three or four miles an hour. Why he could grab a man by the collar and jerk him on the foot board; he could run ahead six feet and grab him and throw him off of the track; he could have screamed "Get off of the track", it only took a step and a half; a second, and it would have put him out of there. Or, gen-lemen, they could have flagged through the steam, if they had had a footman there. Would they have hit Huxoll?

They can tirade against this lawsuit; against these people asking them to pay them money, but just one man on that foot board looking along there, would have saved this man, and saved to these little children and the widow, a kind and affectionate husband and father. Is that due care?

But that is not all. The rules of this company that have been offered in evidence, state, that when switching in the yards at night they are required to have a head light on both ends of this engine and in foggy weather, and in the presence of steam and smoke where the view is obstructed, the night signals shall be used in day time. Think of that. Did they have any light there? No, none at all. Why gentlemen if they had had a strong headlight on the tender of this engine, going four miles an hour, Huxoll could have seen it and got away. In absolute disobedience to its rules in regard to that point. In absolute opposition to those rules requiring a headlight to be burning at times like this, they ran that engine into the steam and smoke. Is that due care? Will you say that is the conduct of an ordinarily prudent and careful person under the circumstances. Now one or two things more:

Oh, gentlemen, I do not think they were going four miles an hour, I think they were going nearer twenty miles an hour; and there is just one little incident that was pried out. It pretty nearly took a crow bar to unroof it, but it was pried out of that man Riggs. He let the cat out of the bag. He said, "We slowed up at the stock yards and I told Zimmer that it is just about time an extra comes along". What Would be the natural thing to do. Loiter along on the main line,—take it easy, and go three or four miles an hour, and stop occasionally to warn whoever was on the track. No, the natural thing for those men to do was to get out of the way. There is the proposition. An extra was due, and they must get off of that main line. Do you suppose they would slow down to three miles an hour and get out of the way of that extra. No gentlemen. They came like a cannonball, without any brake or footman or any headlight through that darkness. And drove Fred Huxoll to his doom. Is that due care?

Oh, gentlemen, the circumstances show you that it was not going four miles an hour. The Union Pacific would not have an engineer on its road; they would not have a hostler, they would not trust a man to take an engine from the coal house to the round house, that could not stop an engine with a power drive wheel brake, going four miles an hour, in less than forty feet.

Now gentlemen, that is just one of the many things, that show

there was not any due care at all used to protect this man; but through the gros-est neglect of its agents, and employees, this railroad company ran him down. Now gentlemen, there is
721 another phase of this statute, and I presume Mr. Strode began it in his voir dire examination, and there is just two things to any degree that counsel here have spoken of. Strode has said not much of anything except, walking down the main track, and Mr. Miles scarcely anything else but "That beaten path". Those two things have been harangued at you until it makes you sick to your stomach.

Now then they will a*gure* that this man Huxoll was walking down this track, and his own negligence caused his death, and because of that, you must deny his wife and children anything. Now I want to devote a little attention to that. If he was guilty of some negligence, that does not beat them, they are still entitled to recover under this statute. But you must reduce the recovery to the extent that you think that his negligence attributed to his death.

At the outset, there is not a syllable of evidence, anywhere in this record that shows that Fred Huxoll did a thing but what a man of ordinary care and prudence would have done under the circumstances. I say that deliberately and I mean it. And I think a discussion of the proofs will justify it. Take that awful day: Gentlemen, some of you remember, perhaps, on the 12th day of January, 1888, that awful storm in this state. Where men got lost and never returned. Where they were only going a few feet to take care of their stock; where the only way a man could go from his kitchen door to his barn was to follow the clothesline. Why gentlemen, I remember one incident reported of two brothers living on a ranch up here in O'Neill. One of them started out to the barn, a couple of hundred feet from the house. After he was gone ten or fifteen minutes, his brother and some acquaintances that happened to be there, went out and shouted to let him know which way to come. Three months afterward, they found his body partically devoured by coyotes, thirty miles away from there.

722 That shows how bewildered and confused a man may-be when he has lost his way in a terrific storm, or amid a cloud of smoke and steam, through which he can not see at all. And yet they would lay all this misfortune of this awful calamity up to this man, to defeat his widow and helpless children. Why gentlemen, I will stand for him like a lion in the path against these men, as long as I can, before they will make that proposition avail in this court. What did that man do? He proceeded to the wash house; that was the place for him, wasn't it? Prepared himself to take his engine. He knew where his engine would be, or someone knew where it would be. You would suppose it would be on this spot track here, would you not. He proceed- to the wash house right here. Then he left the wash house. Now, they all say there are several ways to go. He could have gone around the north side of the turn table. Supposing that he would have said that he would take that way, and he would have gone across those nineteen tracks

those nineteen railroad tracks, amid that smoke and steam, and a
engine would have run him down, and his children and widow
would come in here and ask for relief, what would they have said
Why, they would have said, that he was an absolute ignoramus
that he had a beaten path, a beaten path, and there would hav
been some reason for their statement, in all reason and candor
Supposing that he had said, "I think I will go straight across th
turn table there," and he had walked the plank along the rail ther
and he would have fallen in there, into that which Mr. Borto
says was a pit ten feet deep, and had lost his life. They would hav
said the same thing. Supposing he would have gone down her
past the turn table, he knew that was the place where engines wer
always standing, and moving back and forth, and amidst this blind
ing storm, he would have stumbled over that track, and was ru
down, they would have said, "The — idiot, if he had gone dow
there, where he could have seen this engine, or felt his way, h
would have been entirely safe". And with some reason to
723 But when he took the only course that any man exercisin
good judgment would have taken, they contended that h
was guilty of negligence.

Now what course did he take: Here is the wash house, (Indica
ing), and he had to get around this turn table. There was a p
fall, a death trap, ninety feet across, and he had to get around tha
He could not see his hand before him. He had to get around tha
hole, and there is twenty seven and seven tenths feet between th
outer edge of this turntable pit and the main line of the rail roa
But gentlemen, there is an arm sticks out this way, when it
turned that way, and he had to get around that, or stumble onto
and get hurt. So that he had to go within 12 or 15 feet of this mai
line track. And that is the way he went,—but perhaps that ar
wasn't there, and he didn't have to come only just south of the tur
table. That is there he came. (Indicating.)

Now, I want to read you what that man Dupont said, that he di
after they got there. After they got to the turn table, I want t
tell you what this man Dupont said,—the man, and the only ma
by which they will attempt to have you say that this man Huxo
was on the main line track,—no witness ever hinted at it. Borto
denied it in this particular, that when we asked him if he saw an
tracks, he said "No, I never saw any tracks along the railroad track.
He disputed that. But here is what Dupont said, gentlemen: "Fre
Huxoll and myself started from the wash house, a small building
about 15 or 20 yards west of the above mentioned round house, an
started out in a south easterly direction,—right off this way (Indi
cating),—passing along the side of the turn table at the round hous
and continued "How?" in a south easterly direction,"—right o
this way,—(Indicating) "passing along the side of the turn tabl
at the round house and continuing in a south easterly direction
toward our engine, which was stationed on the spot track." Don'
you tell me that Dupont said that he went into the mai
724 line track directly south of the turn table; that main lin
track runs just as directly east and west as you can shoot

bullet. Don't tell me that he went down the main line track. *Ont* on Dupont's statement. He states further. "The deceased, and myself continued in this south easterly direction, until we neared the main track at a point about ten yards west of the water crane." Tell me that Dupont said, that Huxoll walked down that main track; Dupont said that he and Huxoll continued in a south easterly direction from that turn table to within thirty feet of the water crane. They could not go in a north easterly direction and follow that main line track, or a southeasterly direction, I mean, when it is just as near east and west as a line can be drawn.

Oh, but they say, "There was that beaten path, and he could have gone right on that." Think of it,—that he could not see,—keep that right before you. If he had come out there and looked up and down this track, and saw this engine standing away down here, he would have known that. But as he was, bewildered, with no ray of light to guide him in his way, except the lash of his master to go,—and he went. What did he encounter, when he got down here within thirty or forty feet of the water crane. He then passed opposite that engine,—he could not jump over that very well. If he had stopped as I say, and then gone around in front of it, they would have said, "Why didn't you go on,—there was nothing there?" Why, he went on knowing that his engine was over there. Then when he got down within thirty or forty feet of the engine, what occurred to him. He probably heard that man Nicholson turning this water into that Orton engine, or Clark pouring water into the Orton engine, and what did he do. There in front of him was a platform, just about the size of the one you gentlemen sit on now. That that man Johnson, who lived in the yard, the yard master or the yard foreman said, was covered with a sheet of ice like glass; would he undertake to cross it. He saw an engine standing there, and Nicholson said the engine extended two feet and three inches over the rail. That left a space less than three feet wide, between that place and that engine. Would he chance having a pail of water poured down the back, of his coat collar, in a temperature of fifteen degrees below zero? Would he chance that? If he had, and had taken a severe cold and died, and they had then sued, wouldn't they have said "Just two steps to the right and he could have passed right around that crane, and there wasn't a thing there." And gentlemen, wouldn't it have been plausible.

Supposing he had attempted to have crossed there, and slipped upon that glassy surface, and broke a leg, this suit was brought afterwards because of the injury, what would they have said. They would have said "You should have known more than that. That was open and obvious and everybody knew in that temperature, ice would be there. If you had just taken two steps to the right there, and had just turned around that platform, you would have been just as safe as you could be. And wouldn't there have been some excuse for that.

What did he do? He came down near the water crane, and knew the situation. Going out on this long journey, would he have

wanted his clothes saturated with water? No. And he took the only course, and stepped to one side, and just as he did, this cannon ball, without any bell, or brake or whistle, came out of this cloud, and struck him. Gentlemen, there is no contributory negligence on the part of this man.

It would be a shame and an outrage to find him so. And especially under this evidence. The was going the best way that he could. Johnson told you that the only way in which he could keep his way,—Johnson told you himself, the only way that he could keep his way, was to see the black mark of the rail leading through the snow.

726 But the last effort of Huxoll, as detailed by this man Dupont, the last effort that he ever made to again see this widow and his babies, was an effort to get out of the way of that engine, as quick as his attention was called to it, but at its rate of speed and equippped with the equipment that it had, he could not make it.

But that is not all. There is one more thing, if it needed any more, that sweeps every vestige of evidence and every scintilla of suggestion, that he was guilty of contributory negligence out of the way. Gentlemen, he was operating under a train order. He was operating under a train order, and he had directions where to go. It told him to run extra from Sidney to Perdue, and run extra from Purdue to Sidney, and that he had the right over all Eastern trains, Sidney to Perdue, and number 56, Perdue to Sidney. Oh gentlemen, that man Huxoll, on that fatal morning, on that morning in that awful storm, was told by this Union Pacific Railroad, that there is one place, Mr. Huxoll, on the entire Union Pacific system, one spot, where you can go, and where we will protect you, and that is on the main line track from the station of Sidney east to the station of Perdue. He took their word, he went upon the main line track, and they didn't keep their promise.

Oh gentlemen, don't you ever say, that he contributed in any manner to his death. He was using the care of a careful man, in proceeding down that track that he was. Gentlemen, I will not try to go over in detail all these different circumstances. It would be too tedious to you if I undertook to do it. You see them,—these are just some of them. But they stick out and just bristle all over this case, to show that really, it was almost a murder to kill that man under the circumstances. Absolutely no care, but the grossest, grossest neglect, where he in obedience to his master, was on his way to perform his duty.

Now, gentlemen, I think that is all I will say upon the question of negligence or contributory negligence. Just one word on

727 the assumption of risk: A servant has a right to rely on his master that he will use all possible care to protect him from injury. That is part of the contract, that the master will use due and reasonable diligence, to save his servant and protect him. He has a right to rely on that. And if the master fails in that act, and is negligent, he does not assume that risk; because it is no part of the contract of employment, that the master will be negligent in

the conduct. So there is nothing in the assumption of risk. But just one more thing.

We proved that they crossed Rose street, a public highway, crossing in the city of Sidney, and this accident happened within 800 feet of it, and the evidence shows they never made a whistle from the time they started east, until the time they hit Huxoll, and the statute of the state of Nebraska, fixes the penalty, for not doing it. Gentlemen, is that due care? Expecially in plowing through that steam and smoke. Why a good long toot of the whistle would have saved Huxoll. Supposing they would have come through there, with a "W-h-o-o-p", wouldn't they have heard it? Yes sir. Oh, gentlemen, just a toot of the whistle, would have saved a human life. Is it due care to refuse to whistle under those circumstances?

Now, gentlemen, I want to discuss the question of the amount of damages: You are going to give a verdict to this widow, and these little children, there is no question about that. We are clear beyond that, and there is no power of this railroad to stop that in my judgment, and it is just a question of how much. Now gentlemen, how much? Here was a man, 29 years of age, in perfect health, devoted and affectionate to his wife, and children, who had an expectanch of life of thirty six years. Making on the last month of his earnings, $177. and some cents.

728 Now gentlemen, these babies are entitled to receive from your hands, just compensation for their loss. Now, gentlemen, how much have they lost? They have reason to expect this man, this kind and affected man, as the undisputed evidence shows he was a man of good habits, a man of sobriety, and a man who devoted his earnings to the use of his wife and family, they had reason to expect that as long as he lived he would continue to have his earnings. Now gentlemen, the tables of expectanch show that he would have lived thirty six years. Now there is a little tabulated statement there, that shows the amount of the present worth of his earnings.

It is stipulated here that a regular engineer earned from $150 to $200. They have a statement here that we admitted was correct, showing that the average wage of this man for the three years was $1480 a year, but for more than two of the years of which they have tabulated here, this man was a fireman, and extra engineer, and only got an opportunity at an engine, when some other man was not at his post. The last few months will disclose here, how his wages ran. Now at $200 a month or $2400 a year, in thirty-six years, which is his expectancy he would earn $87,472. The present worth of that sum figured at four per cent would be $65,000. Or at 6 percent $41,353. At $175 a month, less than he was actually earning, it would be $2100 a year, and in his expectancy he would earn $75,633. The present worth at four percent would be $44,409, and at 6 per cent, 36,185, and at $150 a month he would earn $1800 a year, or $64,800 in the 36 years of his expectancy, the present worth of which, at four per cent, would be 45,000 dollars, and at 6 per cent, (Reads figures prepared in a statement which he holds in his hand.)

That, gentlemen, is just the salary, he made at the age of 29 years. Few of us, gentlemen, are ever prepared hardly to make a living at that age. Why, at that age, as I understand it, Harriman,
729 one of the princip*le* owners of this great railroad, before he went to his death, was a poor son of a poor man. Jim Hill, the princip*le* owner of the Northern Pacific, the Great Northern, and the Burlington, at that age was working on the section at a dollar and a half a day. Look at this man: He was not only qualified to run an engine, but he was qualified as a business man, and who can state, but what when he was fifty years, he might have owned, more stock of the Union Pacific, than Harriman left.

Oh, gentlemen, why should these little innocent tots be denied a fair show in the race of live, because their father went down under the pond-rous machinery of this great railroad company. Then give them a show in the race of life. Give them a decent show; do not slander these little children by writing a record against them that their father wasn't worth anything. Why they will almost tell you from the evidence they tried to introduce here, and the exhibits here, that this man almost committed suicide.

Gentlemen, it seems as though I can see him now as he looks down upon this upright judge, and this honest jury. I can hear him say, "You may beat my widow and children, but spare them from disgrace. Leave them an inheritance of a good name for me. Never insinuate that I didn't make every effort to again come back to them, and be a staff to support them as l*ing* as I lived." Gentlemen, a small sum is pittance, you have no right to say gentlemen, in my judgment, that he could not have earned more than $200 a month. Supposing my friend Strode, should happen to be accused of negligence upon some railroad, but being killed, his heirs brought suit to recover a judgment because of the negligence of the railroad company. A man with a large office, a great income, of probably $20,000 a year. What would you say when his wife and children come here to ask compensation for his wrongful taking away. Would you be niggerdly?

730 Gentlemen, this $50,000 is a pittance compared to all the help and the assistance and the financial aid, that he may have given to his little children. As I said on the outset, they are not begging, and I am not standing here gentlemen, asking any donation or any charity. No gentlemen. All I want you to do is to heed the demand of these *little* little innocent faces that this railroad company owes them. And to heed the demand of this widow. It is hers, and theirs of right. Your verdict, gentlemen, may drive her children to beg their bread, but I do not think they will ever be made to beg by this jury. They are in the right, and we have the promise of God, that he will not see the righteous suffer or their seed begging bread.

All I ask of you gentlemen is to pay back,—not to give; not to contribute by charity; but to pay back to this helpless widow, a part of the awful loss that this railroad took from her when it crushed the life of her husband, staff and protector, under the pond-rous wheels of that great engine. I ask you to give back to these children,

not by donation or by charity; but to give back to these beautiful children, part of the awful sum it took from them when it painted its road bed in their father's blood. That is all I ask, and when it is done, we will be content.

Gentlemen, I have talked a long time. I hope I haven't tired you, and as far as I am concerned, I am going to *submy* clients' all into your hands. It is up to you. You have the power to send this widow, and these little children homeless, hopeless and helpless to destruction, or you have the power to give them what belongs to them, and what they have the right to have, and that is what I expect you to do.

The evidence demands it, the law justifies it, and your own conscience will ever approve the act. Yes sir, gentlemen, it will plead trumpet tongue in your behalf, in the last day when you
731 stand on your own trial, before that King of Kings, in the Court of Courts:

I thank you gentlemen:

It now being 12 o'clock, Noon, October 23rd, 1913, court adjourned to meet and continue the arguments in this case, at 1:30 P. M. same date.

732 1:30 P. M. October 23rd, 1913, court met pursuant to adjournment, and the following proceedings were had and done.

Mr. Comstock: In my statement concerning Mr. Strode, it was made in the heat of an argument, when I thought the claim he made, almost could not be made in good faith, and it was made under these circumstances, and I want the jury to understand that I did not want it to consider it in any particular in this case.

Mr. Strode: If your honor please, I think the matter of what was stated should be called to the attention of the jury, and they should know what Judge Comstock was referring to, as I know what he is referring to, but I do not know whether or not the jury does.

Mr. Comstock: I referred to this statement of dissembling and fraud, and I do not want the jury to take it into consideration in any particular, and it does not apply to Mr. Strode. It was made in the heat of a discussion, when we perhaps loose our composure.

The Court: The jury are not consider- any side remarks from the attorneys, or arguments on the side, from attorneys, either across the desk, or any other time, but try this case upon the evidence and the law.

733 *Argument of Mr. Miles to the Jury.*

If your Honor Please: Gentlemen of the Jury:

All of you will agree with me in this conclusion, that we are happy, and are to be congratulated that we are nearing the end of this case. It has certainly been a very irksome trial to you, as well as the lawyers, and everybody else, concerned. But, gentlemen of the jury, we as laweyrs, owe to you in any statements we make before you, honesty and sincerity. It matters not whether we are interpreting the evidence, and asking you to give that your consideration,

or giving you our opinion upon some question of law. We owe to you gentlemen of the jury, honesty and sincerity of purpose, and we should not make any empty declarations of statements. There is no prerogative of your citizenship, that imposes upon you such an obligation as that you are called upon to perform, when you take your position in the jury box to determine troubles between your fellow men. It is the grandest prerogative of your citizenship, and I am fully satisfied that is fully impressed upon you, and it is scarcely necessary for me to mention it.

I was somewhat amused I will say, at the paradoxical statement made by counsel who proceeded me in his prefrctory remarks. He stated to you gentlemen that this case demanded at your hands your e-rnest and candid consideration, and in the very next breath said that he could see reflected in your faces that an argument from him was scarcely necessary. Now he may possess some extraordinary powers, and I confess, gentlemen of the jury, recognizing my peculiar office as an attorney, that there is a-ways in my mind some doubt or some misgiving as to what a jury may feel at the time under the circumstances. And you gentlemen are the sole judges of the facts in this case. You are the sole arbitors as between the
734 plaintiff and the defendant, in judging the facts adduced here upon the witness stand. The court has given to you the law in this case. I do not believe under the peculiar conditions existing in this case, that it developes upon me to go beyond the interpretation of the court but to leave that law, with you because it is also your duty gentlemen, to take your law from the court.

Now gentlemen, all the defendant asks at your hands in this case, is a fair and honest consideration of the position in which it is made to appear before you, judged from the evidence. I will not indulge in any extravagent statements for I am satisfied gentlemen that after the examination of you in the beginning of this trial, by my associate, Mr. Strode here, I am satisfied from your answers, that you fully appreciate your obligations and that you entered upon the trial of this case, determined to do right, and that you will do right as you see it gentlemen.

It was stated to you that there was no begging, no demanding, no asking for charity on the part of the plaintiff in this case, but all that the plaintiff was asking, was that that be returned which we took away. Gentlemen of the jury, we can not do that. The voice of omnipotence has spoken, and the deceased has gone to his eternal law, and you will unite with me, in saying "God rest his soul."

There is no use for us to consider that proposition, nor was it necessary that such an extravagant statement be indulged in here. There is no malignance in this case. There should not be any malignance in it, because it is an issue of law, and the facts have been given to you gentlemen for your consideration, and the law has been interpreted by the court. During the progress of the case, such expressions have been indulged in by counsel, in propounding questions to witnesses, as would make it appear that there was some malignant action on the part of the defendant. Unfair statements,

gentlemen; if you please. Such statements, as from the cir-
735 cumstances and the facts in this case, were not warranted. One of them being, "The engine that ran Huxoll down."

Exery time it was possible to inject that into the case, it was sent in, and gentlemen what is the implication, as fair and intelligent men, what is the implication in the expression "Ran Huxoll down."? Why gentlemen, it is this: That with deliberation on the part of the defendant in this case, and with the full knowledge that the deceased was coming down the main line, we put on steam and started our engine after him and we ran him down. It might just as well have been put before you in that language, as by the expression, ran him down. Why gentlemen it is evident to you, it must be evident to you, that the engineer Zimmer knew nothing of the deceased being upon that track. If he ran him down gentlemen, it would have been wise to conclude, if I can construe language, that he saw him coming and started after him, otherwise the expression "ran him down" must be eliminated from your consideration here.

The evidence in this case, gentlemen is conclusive upon this one proposition upon which I now address myself to you. That the deceased started from the wash house to go to his engine, and after he went in the direction of the main track near the turn table, he took the main track to continue his journey down to the engine; and the man Dupont he was walking with, walked not in the main track, not there, but in the way in which engineers had fireman usually went to the east out going spot track to get to their engines. Now there is the undisputed evidence, and it is also undisputed that he was struck about fifteen feet,—the preponderance of the evidence is that way; east of the water crane, about fifteen feet, east of the water crane. Now gentlemen, unless you believe that the engine in use at that time, had a defective brake, and that on account of it, the engineer was unable to stop, it will be your duty in this case to give that matter great weight in your deliverations. Now what
is there to that gentlemen? The engineer, Zimmer, took
736 this witness stand, and candidly told you that at about eight o'clock in the morning before they had operated the engine very much, he discovered that the pistons used in applying the brake shoe to the wheel had water on top of them which had caused them to freeze up, and that the air was al-right, the air being behind it,—that the power was all right but that the brake shoe on account of the frozen pistons could not be applied to the wheel. Now what did he do? He did that which any man of experience under like circumstances would have done. He went down and got some waste, poured a little oil on it, and put it on a scoop shovel, and thawed it out. Thawed out the piston, and immediately thereafter went to work with that engine, and continued to work with it until the time of the accident, and that there was no time during the progress of that work when the brake machinery failed to respond. Now, gentlemen, isn't that the evidence? And what did we do further?

Although we were critized some for it by Mr. Comstock. He said we went up to Omaha to get an expert and said we went down to the Burlington Railroad to get an expert. Why gentlemen, where could

we go to get testimony on a matter as important as that. It was our duty to give you the best light we had, and we did so. We went to our own railroad, the defendant, and asked them to send our expert here. We then asked Mr. Wheeler of the Burlington to come up here, in order that that machinery might be thoroughly understood and explained to you. That you might consider their evidence in connection with the evidence of Zimmer, and then determine for yourselves from the evidence, whether or not there was anything the matter with that brake. There certainly is no evidence before you here gentlemen, that there was anything the matter with it, but that particular thing, and at that particular time. And if you decide that the braking appliances were defecive then you must so decide gentlemen on account of the ex-
737 planation given to you on the stand by Mr. Zimmer. Another circumstance in conection with that perhaps, is this:

Mr. Comstock tells you that the undisputed evidence shows that the engine moved an engine length after Riggs told the engineer that he had felt that jolt under the tender. Now gentlemen, the undisputed evidence is, and I believe you will agree with me, that Riggs told the engine man that he felt,—when he felt the jolt under the tender, and that,—you will remember that,—that Mr. Huxoll was struck about fifteen feet east of the water crane. And when Riggs felt the jolt under the tender, it is safe to assume that the engine proceeding along, that it must have gone at least twenty-five feet. Add that twenty-five feet to fifteen, and you get forty and deducting that from what is agreed upon by all of the parties as the place where Huxoll was taken out, seventy-two feet from the water crane, and you have thirty-two feet left. And gentlemen that does not allow a second time to Zimmer to get his hand upon the brakes and apply the machinery. Not one second, of time gentlemen. Just put yourself in the position of Zimmer at that time, gentlemen. Put yourself in the position of a man in a locomotive where he has been made to believe suddenly that he has run over a human being, and consider what you would do under the circumstances. The best you could gentlemen, the best you could do. And that is what Zimmer did. He got his hand to that lever as quickly as possible, and even Matthews, their own witness says it came to a sudden stop. Why gentlemen, if there is anything whatever in the incident of the pistons being thawed out on that morning, then you must consider it in connection with its effect upon the brakes afterwards, and whether or not the brakes continued to do their work, and it is the undisputed evidence from the witnesses upon the stand and by the plaintiff's, as well as our witnesses that it responded, and when they got there to the scene of the calamity, it is, that the brakes were taken down, and that they were afterwards attached to the engine in the round house,
738 and the inspector comes upon the stand, and tells you his story. Now gentlemen, there was perhaps one or two allusions during the progress of this trial to the fact that the men who testified on the part of the defendant were testifying because they were employees, and they would not take issue with the company under any circumstances. But gentlemen, they are human beings,

just like we are,—created in the same image, and likeness, and controlled by the same emotions. Having the same ideas and the same regard for truth and such nonsense as that must not be considered by you gentlemen in coming to a conclusion in this case. The time is passed when such declarations weigh anything with a jury. We are reaching beyond and above, if we haven't already reached a condition in this country of ours, where corporations have sway. They are being restricted within narrower limitations, and the government has reached out its all powerful hand and has taken hold of the situation, and the corporation, gentlemen, has been made to realize if it were necessary, that these considerations must weight with them, and that they must remain within the law. If that be not true, then gentlemen why do you see the magazines filled with reports of examinations of new appliances; with the development of signals along lines of railroad, both single and double track, to come within the requirements of newly enacted legislation.

I want to say to you gentlemen that this reference is only made to you for the purpose of appealing to your passions and your prejudices, and appealing to your emotions too gentlemen. But you remember that in your sovereign capacity here as jurors these things should not weigh with you. Simpathy when well directed gentlemen is a wonderful thing, but when it is sought to make it march along before prejudice and passion then it is such a desecration as to bring forth condemnation from every man. Simpathy well becomes a man; I pity the man that hasn't it. I have never seen him yet. Perhaps there are circustances and conditions that would be brought up here, when a man would be without it, but there is buried in the heart of every man that recognition of his fellow man's
739 position that will call forth those qualities, and how base is it for a man to stand here in this court room and appeal to you,—get outside of the record,—get outside of the evidence and talk about other matters, and talk about this and that condition. Why I have a family myself; they have grown up; and I have grand children. I love them if a man ever did love his family, and I extend to them all the consideration that the Almighty God has made it possible for me to exercise towards them, and I do not think there is a man today, within the sound of my voice, who will make quicker response to charity than I, but I do not like to see it abused and perverted. If men are in court trying a law suit, that law suit should be tried upon the principles that control, under such circumstances, and there should not be an effort in the language of the immortal Bob, to tear passion to tatters, and to very shreds as it were, and deluge the stage with tears.

Brother Comstock, and I say this respectfully, would have made a very much better actor than a lawyer, because it is the actor's duty to make unreal and imaginary things seem real. And that is not the duty of a lawyer. Now gentlemen, there is no controversy on the proposition of bell ringing. Mr. Matthews the man upon whose declaration this case was founded, says "Yes sir" and "No sir". And he says "Yes" and "No" to every other proposition in the case, and what are you going to do with it. A very strange condition pre-

sented itself gentlemen, in the early stages of this case. We presumed that we might have him here,—we hoped that we might have him here, because his inconsistency and his illogical utterances both in deposition and on the witness stand here, made us feel that he would change front if he got upon the witness stand and told the truth. As it appeared to you, we did everything we could after being obliged for a moment to stand here before you under the accusation that we had something to do with spiriting him away. The accusation was hasti- made and made by a gentlemen whom I believe would not have ever made it if he did not believe it. Because I consider him
740 a manly man, and just as quick as he realized what it meant to us he apologized. Now we would liked to have had him here gentlemen, because there is nothing we understand from what he says. When we ask him about the custom, you will remember that the evidence states that there was such a custom in the Sidney yards, and that some men did it and some men didn't, and that every man had a custom of his own. Now, this is Matthews' language This is a transcript of the evidence taken at the last trial. I will read a question to you.

"Q. Isn't it the custom of switchmen and wasn't it at that time, to have the switchmen, if the engine was backing up on the main line, to go by a switch, and head in on another track, for the switchman to ride on the head end of the engine?" Answer, "It might have been. (Reads some of Matthews' testimony to the Jury.)

Now gentlemen, Zimmer, was up there in the cab, and in responding to that, was obliged to take some time, when the engine was moving along here slowly, and when you consider it from that standpoint, you cannot help but realize that Zimmer made a very quick stop.

Now in relation to going down the main track. Why gentlemen it is hardly necessary for me to call attention to this as it has been before you during this trial, about all the time, after its introduction. Now here is the wash house, (Indicating) and here is the direction pursued, according to the undisputed evidence, of Mr. Huxoll, the deceased, until he got on the main track, and he continued on the main track, until the engine struck him. Now I do not like to refer to the unfortunate event,—it was too bad, and we regret it very much. But we have been made to meet the issue, and I will ask you can — reconcile, as men of common sense, taking the position in which the plaintiff places himself in this case, any man's ac-
741 tion, as the exercise of good judgment, who would try to go around these 19 tracks, that Mr. Comstock so clearly pointed out to you. It would be awfully foolish when he had this walk, and it would be equally foolish for him to go down the main line. It was there and if the deceased, gentlemen, had a free and unobstructed track to go down from the wash house to his engine on, and he chose the more dangerous one, then gentlemen he assumed the risk. He assumed the risk.

The other track was unobstructed and strewn with no dangers, but he turned aside from that, and went onto the main track. Was that ordinary care, or due care. Why gentlemen, I can't see it in

that way. Here was a railroad in operation, and a division point; a yard that the deceased had been familiar with for six years. He was running in and out of it for six years. During all of the time he was either a fireman or an engineer. Can it be said gentlemen that he didn't understand the situation. Can it be said that he didn't realize what might happen by taking that main track, or he not have known gentlemen, that the switch engine was in operation in the yards. Now consider the position of the deceased in that light, in connection with the position of the railroad company, the defendant.

Now gentlemen of the jury, there is this proposition and I want to say although a switch engine has been injected into this case a hundred times, I want to say, to the gentlemen, that you can find the use of the term nowhere in the book of rules. Nowhere in the book of rules, and I want to say to you further that a yard engine according to the rule you introduce is confined to,—or defined as an engine working in the yards. They talk gentlemen, about a platform for men to walk on, and for what purpose? Gentlemen, to mislead you? There is evidence in this case, that engine number 213 had steps, but they weren't just the particular steps these gentlemen have reference to, and again gentlemen, in this connection, it comes to me:

You will remember about the last stage of the production of
742 evidence here, on the witness stand, counsel through Mr. Riggs desired to show that there was an agreement between the company and the switchmen as to certain things. Now gentlemen of the jury, wasn't it up to him to produce that agreement, but he didn't do it. What was the use of doing that, if he didn't intend to show you that agreement here mentioned. If it was done for parade, if it was done for show, and effect, why then, you can give it that much weight in your consideration which you feel it entitled to. But if there was anything in that proposition, he should introduced it after Mr. Riggs said he didn't know anything about it, and didn't suppose there was, and finally that there was not. I presume that there was. I presume that he was honest with it, and I presumed that he would eventually present it, but he didn't.

Now gentlemen, there has been a whole lot of that in this case. There has been a whole lot of it, because they think it is possible to produce certain effects in conditions where corporations are sued, and particularly railroad companies. Four hundred and twenty five miles west of here, you gentlemen of Lancaster County, this accident occurred. Every county in the state, between here and there, on the line of the Union Pacific, already has been left in the distance, and your county selected as the mecca of the dissatisfied attorney who instituted the action. What a privilege you are holding out. What indulgence you are extending. Why gentlemen, I think you should take that into consideration, and if your county is to be the mecca, and it is to be approached under all such circumstances and conditions, that your tribunes may try these cases, then you are prepared for it. You will remember too, gentlemen, that at various times during the progress of the introduction of testimony,—now I mention this fact on account of the little in-

sincerities that drop into this case, that witnesses at times said they could not remember, and said they could not understand. Perhaps it might be a desire to avoid and evade. But how are you going to bear with Brother Hoagland who took the witness
743 stand, and who went out into Wyoming, and who took this deposition, and was asked questions gentlemen, regarding the most material things in it, and how much did he remember? I do not charge him of evasion, I do not charge him with any desire not to tell. I am going to let you decide that feature yourselves. But here is an old practitioner,—a lawyer of more than ordinary ability, taking the witness stand, on a question that meant everything to himself, and yet he was unable to tell. Was it because he didn't have the custody of the deposition. He testified, gentlemen, that he exercised the precaution to have a carbon copy made at once, and he has slept with it since, and he was unable to tell you much about it. Now is it a wonder that the ordinary man, a layman, a man that does not understand the intricacies of the law, a man who is not able to protect himself upon the witness stand should do those things. Why gentlemen, I was surprised I certainly was surprised, because to me it was a most pitiful exhibition from a standpoint where we least expected it.

The man who instituted the action, the man who had more occasion to remember it, in all of its details, forgetting, such trfling little things, as one of the allegations of negligence. The very thing upon which his action is founded. The very things upon which his action was founded. It was certainly a delightful situation to find the old lawyer, and the old practitioneer in, and it should make us feel rather leniently towards the witness who takes the witness stand for the first time, and finds himself in the position of seeming contradiction. Why he might be asked to testify upon the witness stand today, and three months later, to take the witness stand, and testify upon the same matter, and then his answers might be a little different, and clothed in a little different words. But the lawyer who seeks to turn it to his own advantage, in a case where he is trying the law and the facts before a jury, Oh gentlemen.

Now gentlemen, these cases take peculiar positions. Pe-
744 culiar turns. You can hear on the street every where, in answer to the question, what kind of a case are you trying up there,—"Why a railroad case, and the railroad company is sued." And the remark "Oh, well, you might just as well quit." You hear it on every hand, and why? I never believed it, and I do not think there is any occasion to believe it now, but I do think there are certain circumstances and conditions surrounding the case that require limits to be placed upon counsel. In their zeal and ardor to properly represent their clients, they sometimes employ a half a *dozn* men who watch the different people who are associated with the case in one way or the other. They do this beause they want to zealously look after the interest of their clients. These cases taken upon contingencies, gentlemen, that lawyers have no interest in. But there is one thing that is a cinch gentlemen, if they get any-

thing, they must recover it from the railroad. And that is why we have these cases of zeal, and that is why we have methods that are not used in other cases. And if there has been anything of that kind gentlemen, that has come under your observation, think of it only as men, and let it pass away from you, because it does not concern you here as jurymen. It does not reflect upon our system, and it does not reflect upon the court or its machinery, because all men are not alike, and there are some who are easily persuaded to do these things. They have an interest outside,—a contingent interest in the result, and these things happen sometimes. I hope they have not in this case.

Now gentlemen, of the jury, I want to say to you that this is an important matter. It concerns my client just as it would concern either one of you gentlemen, if you exchanged places. These things are growing right along, and the railroad company would never have thought of litigating this case if they felt their was any liability. It will be conceded that in the law department of the various railroad companies and I certainly do not ask you to include me gentlemen, in my observation, as I am a very ordinary
745 person, but in the law departments of the various railroads, they have the best legal talent it is possible to employ. And the first thing to be determined, is liability; and if the company determines it is liable, they want to settle; they do not like to try lawsuits for fun, and gentlemen it is the principle involved in this case, that we are fighting for. It is the principle involved. It is not as was said to you, for the purpose of depriving two little children and a grieved woman of their support. No gentlemen, that is not our purpose. Our purpose is simply to protect ourselves against the condition where we believe, and always have believed, that there was no liability, and when they take the little ones and parade them before you, gentlemen, their only purpose is to cause you to swerve from the path of duty, and to let your passions and prejudices enter into your consideration of the case, so you will not give it that honest, candid consideration, that the railroad company and every other litigant is entitled to under all the circumstances.

It was said by counsel that he appeared here only demanding justice. I am not here demanding justice, I am here simply appearing in behalf of my client whose interests by our law are placed in your hands. I do not come into this court demanding anything. It is the province of this jury, after the facts have been weighed and the law has been considered in connection with the facts, to give me justice; if from the evidence I am entitled to it, and otherwise if not. Now gentlemen, when you go to your jury room to consider this case, I appreciate fully that on account of the mass of evidence, on account of the peculiar conditions that have arisen during this presentation, that you have quite a task before you, and I also appreciate gentlemen, that your minds have been empty during the presentation of this case; and that you have to some extent considered it already, although you may not have arrived, and should not have arrived, at a conclusion by now.

746 There are a great many things gentlemen, to be considered in the case, besides the actual production of the evidence. The witnesses upon the stand, as they appeared before you. Their demeanor. Their personality, and the manner in which they gave their evidence, but do not consider this especially against my friend Hoagland, because he may have remembered by this time. It may have gotten back into his cranium by this time, that certain things may have happened out in Wyoming. But I say, that all these things should be taken into consideration by you. The character of the witnesses, and their demeanor upon the witness stand, and as you were impressed by it, is just as much before you as the words they uttered, and I believe that you will agree with me gentlemen, that our witnesses are honest and manly men, and they are not to be condemned because they work for a railroad company, and that their evidence is entitled to such consideration and as much weight as that of any other citizen.

The deceased was a good man; and a good engineer; a fond loving father, and a doting husband. There is no question gentlemen about that. But that is one of the considerations that enter into this case, outside of the evidence. It is not something for you to try here. It has nothing for you to aid in connection with what you might or might not do here. Your duty gentlemen is a stern one, and your conclusion should be based upon the evidence and nothing else. Nothing else. If it were possible for the defendant to have prevented this accident, under the conditions, it would have done so, and there would have been no deceased. There would have been no bereft widow and family, but I want to say to you gentlemen that when we came down the main track that day, with our switch engine, we had no opportunity from the evidence here, under any circumstances in which counsel will place us to see anything ahead of our engine. They can talk about day lights, they can talk about night lights, they can talk about a man on the leading end of the engine, or otherwise, but the whole testimony is
747 that no matter where they were, they could not have seen through that steam and smoke.

Now gentlemen, was that engine at a place, or was it operating under such conditions where the law imposes in any particular upon the company, anything, beyond the dury of ordinary care and caution. Operating upon this main line, not being cognizant that that main line was being used as a path way for this unfortunate man to go to *go to* his engine, it came down there at a speed of three or four miles an hour, and the first intimation that the engineer had, was right at the time that he was upon him, and the question is, gentlemen what could he do that he didn't do.

Now gentlemen, you can take another theory for this, that if they are right in their assumption, then this man Zimmer should be upon trial in this court upon a criminal charge. He should be upon trial in this court upon a criminal charge, because their theory falls to the ground unless he had some knowledge,—some way of knowing that this man was there, and the testimony shows gentlemen that he took his orders from the switchman, and that he took his

orders from the yard master, and when the yard master gave him his orders he wasn't with the switch engine, and that he stayed in the engine, and didn't know where he was going until the switchman told him, and yet a great deal was sought to be made of that. The engineer is in the engine, and he gets word from the switchman where to proceed, and that is the only way he has to find our.

And you will consider when you take these facts and weigh them, the position in which the deceased was, and Mr. Zimmer was, and all the facts in this connection and arrive at such a conclusion gentlemen as will satisfy your consciences. We stand here con-
748 dending oppositely to the other gentlemen. We have submitted all of the facts, and we are depending upon you for your verdict in this case. We know gentlemen that you fully appreciate your obligations here as jurymen, and that you are willing to extend to the defendant in this case, every consideration, that you would extend to any citizen, and we believe that notwithstanding the peculiar phasings of this case, outside of the evidence, that have been paraded before you, that you are capable of, as men, going into the jury room and setting all those things aside and give to this defendant the consideration that it is justly entitled to, gentlemen.

Railroad companies operating in the state of Nebraska and every place else,—trunk lines particularly, are large institutions. They employ a great many men. They use a great many appliances, and gentlemen that whole system from Alpha to Omega, from the bottom to the top, every man, must appreciate from the position in which he is placed, what his duty is, under certain circumstances. Unless he does that, there can be no system built up. No real system, no work of any magnitude, no work of any character. From what experience, do men employed by these large corporations, whether or not they be railroad corporations, or other institutions, what experience do they derive their education from. Constant work and at a particular place they themselves selected, and when they are made to understand from their association with that work just what the dangers are, and those that are open and obvious, such as walking down the main track, then if they place themselves in that position, as the deceased did in this case, gentlemen, he as I told you before, assumed the risk. When he put the plain unobstructed pathway aside, and walked down the maintrack, to his engine, after six years work as I get the testimony, in and out of that yard, he cannot complain that he didn't know what he was doing.

I thank you gentlemen.

749 (Argument of Mr. Strode on behalf of the Defendant).

Gentlemen of the Jury: I did my best to avoid so much talking to the jury, and I presume that the jury would hold me responsible under the situation if I did too much talking myself. I think you will realize if you go back to the beginning of this trial, that there was an effort made upon our part to get a jury to try this case, that would try it fairly and impartially upon the evidence that is offered here, and under instructions of the court. I think gentlemen, that

you will recall that that is all that we sought to know from you, or to learn from you in our examination. Was whether or not, if you were taken as jurors to try this case, that notwithstanding the sympathies you might have as men, you would not have as jurors, and that the question that would be involved here, the situation that would be presented, would be one that would appeal to those sympathies, that you men have as men, but which in the trial of a case, where you are made the judge of the facts, you are not expected to have any more than his honor here, who as the judge of this court would be obliged under the law, if the occasion arose, to send to the penitent-ary his nearest friend. His sympathies might go out, and he might have sympathy for him, if he could, but he would disgrace the position he occupies, and he would surrender it, rather than not discharge his duty as the judge.

There are some duties that are higher than those that haul and pull upon our sympathies, and when we undertake as men to discharge a duty under oath, that is in the administration of justice, why no man has a right to invite you to look away from it, or to look upon something else that would cause you to forget it. Now, that is where we start,—that is where we started in this case, with a fair understanding that if upon the witness stand, there was a disputed question of fact, that you would consider it and
750 decide it, notwithstanding that sitting over there, was that little girl and that little boy, and this widow. You would decide it as a disputed question of fact, regardless of the parties and we started upon this trial with that assurance from each man who became our judge. I have a right to call that to your attention, since attention has been called away from it.

It would be necessary in the ordinary presentation of a case to call your attention back to that situation, you realize it, that having the matter presented to you, before attention has been directed away from it, and they have undertaken to pull upon your heart strings from the beginning, by the little children that play around this trial. And an appeal has been made here that for them and for their sakes you should not send them home, helpless, and without your verdict. I submit to you that that is the lowest standard that can be put before a jury that has to decide this case, regardless of who the parties are, and regardless of who would be disappointed by the verdict. This court would not do it. Do you think his instructions were influenced on questions of law, by reason of the fact, that upon this side are these little children, and upon our side is a corporation. Do you think the law of this land is different for them than it is for everybody? Do you think this judge of the law here, instructed you differently upon propositions of law, than he would have instructed, if it would have been a suit between men? Did he listen to that argument, or to those suggestions? If he did, he would not have been fit to discharge his duty. The law in its administration does not know parties, it deals with the thing that is to be determined, and decided, and all the pictures of this kind, that you have ever seen, have been blind folded. It is supposed to not look upon parties. In some of these cases, counsel's zeal gets away from them. There

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is no criticism particularly because we all think kindly of
751 every person, who thinks kindly of us. We respect a man who thinks kindly of us; we do not like the hard hearted man, but there are times and occasions, when we have to face stern duties and discharge them, and that is what we are engaged in here.

This is a serious controversy, and I want to submit to you one or two things, and I am not going to go into detail, to argue this case to you, because upon this jury there is just as much intel-igence as there was before you came into this case, or is around this counsel table. You men know and appreciate the tricks of our profession, as we practice them in open court. You know when one side tries to get a little edge on the other, and the court has to come in and quiet them down, and see that the thing gets to running in the right direction, and you appreciate those things, and you appreciate in the arguments of lawyers, that they will argue the extreme position of their side, and minimize the other, but out of it all, you men must find what the truth is and decide this case upon that. Now we have here in this jury, men who fill the ministry, whose mind is supposed to be trained. We have a young man on this jury who is schooled and educated young lawyer; who is supposed to appreciate and understand. We have a stock buyer. We have a retired farmer, sitting on the jury, and an active farmer. We have a man who worked in the blacksmith shop. We have the farmer and the store keeper, and then we have the man who has been around the courts, and heard these trials, and the man who works here in the commercial department of this city. We have here, men from practically most every walk and station in life, sitting on this jury. If I cannot submit this case to you men and have it submitted and decided according to the facts and the law, then it is a helpless effort on the part of a corporation to have a trial before a jury.

752 If this jury, organized of such men, and under such conditions, with the views that they bring to the consideration of this case, cannot decide it, as it should be decided, then as far as *far as* corporations are concerned, they have no occasion to have lawsuits. They should settle upon demand.

Now I want to call your attention to one or two important things that are as big as this lawsuit is big. This law suit, I will undertake to say, as shown here, was born in Wyoming. You take the proposition that the Union Pacific Railroad Company, that is operated and managed by men that have families, that have honor, that have integrity, the same as the rest of us, who believe in justice, and believe in right. There was submitted to the law department of the Union Pacific immediately after this accident, the written statement of every man that was there, or knew anything about it, wasn't there? Every single man that was there in those yards that knew how this man was injured, sat there and wrote a statement out in answer to specific questions, so that definite information would be furnished, and those statements were sent to the home office, and they looked them over and said there was no liability. That was in January, 1911. Among those written statements was the ststement of Matthews. The same as the rest of them. Mr. Matthews

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sent to this office, a written statement that went to Mr. Rich's table, that that engine was being operated at three or four miles an hour; that the brake rigging on that engine was in good repair; that the bell was ringing; and that the engine was being properly and carefully operated. On the very day this accident happened he made that statement out, and it went to the desk of the men who had to pass upon the question of whether this company was in any way to blame. That was Mr. Matthews' statement, going along with all the rest. They said that there was no liability, under that situation. They weren't to blame. That laid there until September, 1912, and on the first day of September, 1912, Mr. Matthews was discharged from the service of the Union Pacific Railroad,
753 and on the 26th day of September, 1912, Mr. Hoagland, was in Wyoming taking his deposition. On the 3rd day of September, 1911, they filed their petition, and that petition, that cause of action; the whole thing was built upon what Matthews said. Not what he said to the Railroad Company when it happened, but when he was fired and went away. It was in September that he was discharged. It was in September that they brought their lawsuit, and it was in September, that they took his testimony. It lay there from 1911, to September 1911, but nothing was done. I want to get attention to that. Now suppose Mr. Matthews had made a written statement at the time this accident happened, and said to the Union Pacific that he was the fireman upon that engine and that the brakes were not working; that the bell was not working; that the bell cord was gone; that they could not stop the engine; and they could not give warning of its coming. Suppose he would have said that. What consideration do you think this woman would have received at the hands of the Union Pacific Railroad Company, had they believed it. Had it been true.. He didn't say that, he said the other, with the rest of them. And they have to act upon such information as they received. Now he changes his story, and he stands alone, and what we have got to try, and the only thing here to determine because it determines this law suit is which time was it that Matthews told the truth, and what is the fact as to what the condition of that engine was at that time.

Now that is the way the situation is. That lawsuit is based upon what Matthews states now. Not what he said when it happened, but what he said in September. Now supposing, we didn't have anything in this law suit at all but just Matthews. Nothing but Matthews on both sides of the same proposition. Saying one thing once and the other thing the next time. What would you do with it. Supposing that the court told you as he has in his instructions, that the burden of proof is upon the plaintiff, that the plaintiff must prove by a prepond-rance of the evidence, the charges
754 that she makes against this company, and we have nothing in the law suit but Matthews and we have Matthews on both sides of it; what would you say to that? Would you say that Matthews on the plaintiff's side preponderated Matthews on the defendant's side. Would Matthews be able in his own statement

alone to furnish a preponderance of the evidence against his own statement. I submit to you that his sworn statement, standing alone will not proponderate over his own statement given at the time.

Now there is another thing to this law suit, that Mr. Miles suggested to you, that is worthy of your consideration. This Matthews deposition, and the bringing of this suit, and the discharging of Matthews, and the changing of his story, to make this lawsuit, or that makes this lawsuit rather. In addition to that, you have the situation that Mr. Miles called your attention to, that they brought this law suit more than four hundred miles away from where the accident happened. Where the jury might know, in that country, where these men worked, where these witnesses lived, where Matthews lived, where he lived then and lives now; where every man who has appeared here upon the witness stand before you lives, and is known, and the railroads yards can be seen; where every condition that lies outside of the record here, would be known to the men who would try the case, instead of trying it there, where those conditions might be known to a jury and considered they bring it far enough away that it is an absolute certainty that you look strangers in the face, and you must look upon a map to know where the railroad tracks were. And I submit to you that in an honest controversy that didn't depend upon the word of a fellow like Matthews, that it should be tried right there amoung the people who are to testify and can see the place where the accident occurred. They are running away from there. They are bringing this matter where every man upon this jury, when the witness is upon the witness stand, must look into the face of a stranger. You do not know Mr. Borton, the man who is in charge of those
755 yards; he is a stranger to every man upon this jury. The only things you have to guide you in weighing the testimony, is his appearance upon the stand; if he had been your neighbor, and if you had known him in the county for twenty years, wouldn't it have helped you decide the question of whether or not his word is good. And so it is we find ourselves out here in a strange place to try a law suit where all the witnesses we can present to you are strangers, to every man here, and the only explanation we can offer you is upon a map, and hang it up here, and let you look at it. Now there may be a mighty good reason for that. You would think there was; there must have been. They must have thought it was to their advantage to get away from those conditions. This woman lives in North Platte. Hoagland lives out there in North Platte; Hoagland the attorney; and their witnesses live away out there, and they bring them all down here to get down before a juty of strangers to them, and strangers to their witnesses who testify, and I submit to you as men, that this has some significance in weighing the good faith of their honest belief in the justice of their cause, and their faith in the statement of Mr. Matthews.

They just get as far away from where their witnesses might be known, and their credibility weighed, and determined upon the knowledge we have, as it was possible to get. Of course they might have gotten down to Falls City, they could not get much farther;

there is one county between this and the Missouri River, and there isn't any county between Sidney and the State of Wyoming. Now you see that they come as near getting to the other end of the State, as it is possible for them to get.

Now another thing I want to call your attention to in the course of this examination, and in the course of the trial, and I know you appreciate that the plaintiff has been represented in this trial by very strong and able lawyers. You have seen that in the course of the trial. You know that from what you have seen here.

756 Her lawyers are so much better than her case, that if she had a half a case, they would make it look like a good one. You have seen that developed here too. No matter what situation there was here, they could make it appear by either argument or suggestion that their position was right, and their case was right, all the time. There has been nothing left upon her side of this law suit that has not been magnified. That was for her benefit; that was all right. She has a right to have good lawyers; she has got them.

Now what did the railroad company do, and what have they done in the course of this trial. I want to get that before you, because that also tells a little story in itself. You are going to have to pin your faith to somebody, in looking at the testimony and considering it,—of strangers. Who brought anybody here to testify about this lawsuit who was there.

They brought Matthews to meet his own statement, and we brought every man that worked about those yards, and knew a word about it. We brought here, and had testify before you, the man who brought that engine in that morning, and the man who took that engine from him that morning, and operated it until Zimmer took up his work, and we then produced Mr. Zimmer, the man who operated it up to the time of the accident, and Mr. Riggs who was on the engine. Has there been a suggestion of a man who was around there or knew anything about it, that we have not produced here. Isn't that entitled to some consideration when you are looking at the proposition to find out who is trying to uncover the facts and the truth about this, and upon whom you can depend. Mr. Rose suggested in the course of this lawsuit, somewhere along the line, that these were employees; unfriendly. Mr. Zimmer testified that he was this man's neighbor, and he lived the next door neighbor to Mr. Huxoll in North Platte. Mr. Dupont testified, and this woman testified that he went to her house the next day after this accident; these employees sympathize with that woman; you do not need to tell me that they are going to give the railroad

757 company the best of it. They are working in those yards every day, and they do not know what minute they will be injured, and you can take it for the truth that their sympathies and their bias all the way through, is against the company, and in favor of that woman's recovery. Look me in the face as men and say to me if that is not true. They didn't give us the best of it. No, they told just what was true about it, that they had to tell. Do you think that Mr. Zimmer,—they say that Mr. Comstock says that he would

be guilty of murder; why nobody but Comstock could ever work himself up to that condition.

Mr. Rose: Mr. Miles said that.

Mr. Miles: No, I made a parallel.

Mr. Rose: No sir, excuse me for interrupting but you have attributed that to the wrong man. And I will leave it to Judge Comstock if he didn't say, that if he admitted what this fellow Matthews said was true, he would be guilty of murder. And we offered that as a reason why Mr. Zimmer denied what Matthews said.

Mr. Comstock: I said he would be guilty of a crime.

Mr. Strode: Well, say crime.

Mr. Comstock: And I think so yet.

Mr. Strode: That only shows, and goes to show, how far we get away from what is right. Now, Mr. Zimmer, if he was going to tell something that wasn't true, would he have come on the witness stand here an- told you men that he thawed out that piston that morning. He said that he thawed it out. Who said that? Zimmer. If he was going to tell something that was untrue then why did he tell that one thing that they say corroborates Matthews, and shows the engine was not working. You just take that statement of Mr. Zimmer and you have a mighty good guide that will guide you through his testimony of what he said about that engine, and show it is true. He told you when those brakes didn't work, and he told you why; and he told you what he did, and he told you then hen they worked. If he is manufacturing, he should have just omitted the fact that they ever failed to work, because
758 the proof showed that when that engine was turned over to him, and uncontradicted by anybody, but supported by all the testimony, that the brakes were in good working order, and the engine was in good working order. He gave you the exact fact, and you are going to find or have to find out whether you can depend upon a man of that kind under the assertion they made, that if he admitted what Matthews says, he committed a crime. He told you what was the matter with it, and what they did, and how they remedied it. Mr. Riggs was on that engine; the switchman. Mr. Matthews said that that bell cord was broken and that the air was frozen, and you could not ring the bell,—that the bell cord was broken so that you could not ring the bell, and the air on the brakes was frozen so that you could not apply the brakes. He said in his testimony that the window on Mr. Zimmer's side of the cab was closed, so that Zimmer, penned up in the inside could not see out. Now, I would like to know where you can beat that? Just fix up any situation you want to,—that window the only means that Mr. Zimmer had of seeing out in the direction in which he was going, and Mr. Matthews closes the window on him, and you have Zimmer sitting in there where he can't even see straight ahead or back. He can't see out running that engine, and Matthews swore that was true. And the bell cord was broke in two and the air was froze, and they could not ring the bell. Can you take that all in the face of such testimony,—

in the face of the fact that they themselves were running the engine. That behind that engine *was* the lives of two or three men, working in the yard,—Mr. Riggs, Mr. Hower, and Mr. Borten the foreman of the yard there,—working there, and doing this switching and picking up these cars. Would they work in that way? What occasion was there for it? Who asked them to do it? Didn't they all testify that they wouldn't do it a minute,—didn't Riggs tell you that they wouldn't work around an engine you could not stop with the brakes, or that you could not ring the bell upon, to give a warning. And they had the window closed too, so that the engineer could not see out. Well Mr. Matthews fixed that so there wasn't any question of that engineer not being able to see.

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Now you take Matthews statement: I want to call your attention to just one or two things in his statement, because they are very interesting. I think I can call your attention to it here. There are so many witnesses I haven't any doubt that some of us have forgotten some of the witnesses who have testified; I have forgotten some of their names. In the course of a long trial like this, it is pretty hard to remember, and that is the reason I want to read here some of the testimony of this man Matthews, because if his testimony is correct, if what he says is true, the railroad company would be liable. If what he says is true. But if what he says is not true the railroad company is not liable, and it all turns on the question of Mr. Matthews, and what he has got to say about it. Now he says here, in answer to a question of what the condition of the air was on this engine at the time Huxoll was hurt:

(Following is what is read from the testimony.)

Q. What was the condition of the air, on this engine at the time Huxoll was hurt?
A. We had no air on the engine.
Q. How?
A. There was no air on the engine.
Q. What was the matter with the air?
A. Why the air pipes was froze.

Mr. Strode (continuing argument): There is an engine running in the yards, switching, with these men working around it, and doing the coupling of these cars, and the uncoupling, with the air froze so that they had no air on that engine. He starts out with that proposition. Now here is another question:

Q. Now what was the condition of this engine number 213, at the time Mr. Huxoll was injured, in reference to whether or not the bell was in condition to be used and operated?

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A. It was not.
Q. What was the matter with that?
A. The bell cord was broke in two and I could not ring the bell from the cab, and the automatic steam bell was not in working condition.

Mr. Strode (continuing argument): Now who put that bell out of business down there. The air was so that you could not ring the bell and then the air was froze up. That engine came in from Cheyenne operated by two switching crews, both of whom have testified here. Now I wonder if that is true. Now here is some more examination. This is examination by Mr. Comstock:

Q. What time of the day did you first begin to fire this engine on the first day of January, 1911?

A. About six o'clock.

Q. In the morning?

A. Yes sir.

Q. Now what was the condition then, with reference to the automatic steam valve that controlled the bell. (Withdrawn.)

Q. What was frozen on this engine, Mr. Matthews, that prevented your using air to control brakes and the bell?

A. The air pump frozen.

Mr. Strode (continuing argument): There you have the pump frozen up; the air pipes were frozen; the pump frozen, and now it is a cinch you could not have any air on that engine. He said it was a steam pipe, but that would make no difference. Do you know how cold it would have to be to freeze live steam? Well Mr. Matthews said it was just that cold. Now you must believe those things, because Mr. Rose believes them and Mr. Comstock believes them.

761 Q. Now do you know the rate of speed this engine was proceeding at the time it struck Mr. Huxoll?

A. Yes sir.

Q. You may state?

A. About 8 or 10 miles an hour, more or less.

Mr. Strode (continuing argument): Now that is what he guessed it that time. He knows. Now here he says about the distance it went. I want to call your attention to that because here is a controversy about that:

Q. Do you know how far this engine ran after your heard someone holler?

A. Yes sir.

Q. About how far?

A. About thirty or forty feet after I heard somebody holler.

Mr. Strode (continuing): Now they have introduced some testimony here that this engine didn't stop within sixty or seventy feet, and the testimony of Mr. Finch that you could stop an engine on a dry track within ten feet. You notice that Mr. Rose didn't ask Mr. Finch how soon he could stop an engine on a wet track,—he asked him how long it would take, in what distance the engine could be stop-ed upon a dry track. And I asked him if the steam and smoke lying over that track would leave a dry track there, and he didn't tell you, and they didn't dare ask him what distance it would be, if the track condition was as the track condition was here. But we have the best evidence of any, because Zimmer says the warning was given to him when this man was under the tender, the front end of this tender here; 26 feet of that engine had passed over him,

before they knew he was under there. That is when the warning was given to Mr. Zimmer, and Zimmer turned from the window and shut off,—turned and applied the air brakes and reversed the engine, and he says he stopped as quick as it could be stopped. Now you just assume it was seventy two feet from that water crane
762 to where Mr. Huxoll was on that track and you assume that Mr. Dupont was ten feet ahead of Mr. Huxoll, walking down there and looking back, and that Mr. Huxoll was ten feet behind him and Mr. Dupont had not reached the water crane,—if there was ten feet between them, he at least was fifteen or twenty feet from that water crane. You could not figure it any other way, because Dupont was ahead of him, and was ten feet ahead of him, and they had not reached the water crane. If he had not gotten within ten feet of it it would be twenty feet. That twenty feet off from your seventy two feet would leave fifty two feet, and twenty six feet had run over him before the engineer knew it, and you take twenty six feet off from your fifty two feet, and get it right around thirty feet. And then he must get in from his cab window and stop that engine on a wet track. Well, he stopped the engine, he says, as quick as it could be stopped, an engine going six miles an hour. At that rate of speed it would go probably six feet in a second. I think it will go over six feet in a second. If it took him a second to turn around, that engine had already gone six feet on the thirty feet; it took him another six feet to turn off the throttle, and he had gone 12 feet of it: Those things had to be done, and I undertake to say that this engine was stopped within ten or fifteen feet from the time Mr. Zimmer got hold of his engine. He stopped it as quick as it could be stopped. But that is all away from the law suit. The whole thing turns upon how Mr. Huxoll got hurt, and who was to blame.

(Reads testimony from Matthew's testimony.)

Now about Dupont: Judge Comstock says that Dupont did not say that this man was between the rails, and he read a portion of his statement. I think he must have overlooked some of it, treating particularly upon the point as to whether Dupont said this man was between the rails. Now Judge Comstock stopped at the point where he says that they continued in a southeasterly di-
763 rection until they quit the main track at a point about twelve yards from the above mentioned water crane. "At this point with Fred Huxoll about ten feet behind me, we began walking in an easterly direction towards our engine, and parallel with the main line track; I didn't see Fred Huxoll step in between the rails on the main line track, but in turning around looking for Huxoll, I saw him walking up the track between the rails."

Now what is the use of saying that nobody testifies that he was walking up that track between the rails. Now that statement should have been read to you in connection with the rest of it, if you are going to use it. Because there is no use in trying to get you to see just half of the truth, and decide it upon that basis. There is a witness who knows, and he was with him, and walked down this track from a point opposite that turn table, between the rails on that track, and got down there to a point where they were struck, and still

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they tell you the railroad company is to blame; that they robbed this widow of *their* husband and this child of *their* father. He was between the rails, and the witness all testify here that they never saw any railroad man walk down there between those rails. It is not the place for them to walk; but there is a wide open space there, in between the tracks, left there, so that they would have a place to walk. That open place is as wide as this jury box, at its narrowest point. Clear down to the point where this man would go upon his engine,—left there and made there by the railroad company for that purpose. But he gets out between the two rails and the rails, and those rails are there for engines and cars. The engines and cars use the rails, they are not there as walking places for men. The evidence all shows that he didn't have a right there. Absolutely none. He got in there and got hurt, and they say we are to blame because
764 we didn't see him, and they say that of course he didn't see the engine. Whose blame is the greater, if we didn't see the man on the track, walking down there in the middle of the main track, when that track was there for us with our cars and our engines, or the man himself walking down that track, if he sees or does not see. Where he does not belong, where he could not be. Why the courts have always told us,—you know it in the country or anywhere, that when you come to a railroad track, that it is a place of danger. The old rule of "Stop, look and listen" had been applied always when you are going across a railroad track, and then what would you think of a man who would get between the rails in the dense smoke or steam without ascertaining who was there, or what he was going into. Why should he, if that steam and smoke was so dense that he could not see his hand before him, why should he walk between the rails of that track down there into that darkness they talk about? Can they do that and say we are to blame? When we are the only people that belong on the track. This engine didn't run off the track, and run onto him,—he was on the track between the rails, and got run onto. Suppose that engine had been standing there at the water crane perfectly still, and he walked down there and butted into it and bumped his nose, and skinned off his face, and he sued us, because there was an engine standing on the main track,—the only place it could stand, would be on the track,—he could not see it, and walking down between the rails ran into it: what kind of a case would that be. It only becomes a lawsuit because he was killed. If there was any other situation, you would see the absurdity upon the suggestion of it. Railroad men walk in railroad yards. What was that open space at its narrowest point of 12 feet, for? Why for men to walk in. Now they say he was going to his post of duty; Comstock talks about that. The evidence shows that his post of duty was to the first engine west of that water crane. Just recall that. And remember that, and remember that Mr. Dupont said; the other witnesses said in going out to get their engine
765 on the spot track, they didn't know whether the engine would be the first or the second one, or the third one, but they went to the first engine, and if that wasn't the first, they went on down the track. Mr. Dupont testified that when they went there they were going to the first engine. The first engine stood west of the water

crane, because the tender of that engine was being filled from the water crane. That engine that he was going to, stood west of that water crane, and he could not know until he got up to it, whether it was his, or the next one back of it was his. Just remember that. They were going to that because they had to go there first to see if that was the one, or whether that was 1909 or 1913, and they were headed for that. Talk about going around the water crane; that stuff of around the water crane, and the ice around the water crane all that was just put in there to make a law suit. He wasn't going past the water crane, he was going to that engine to see if that was his engine first. And if he hadn't done it,—now he didn't have to pass under any shower either,—they weren't giving any shower baths out there that day, or anything of that kind. They were filling the tank with water from this water that was at the back end, and the cab and the engine was west of it. He hadn't reached it. Now that is the situation, and they say we are to blame, and we are going to put it up to you to decide, whether a man can put himself in that position and say first that he is not to blame, and secondly that if he was, that his negligence was not as great as ours, because we didn't see him and he didn't see us, in a place where he hadn't any right to be.

Now in regard to the question of Finch's testimony, you got that I think straight in your mind. This reservoir, one of its purposes there is to catch the water that comes from condensation. And it is taken out from time to time by turning a stop cock in the
766 bottom of that reservoir, and bear in mind in considering that, that Mr. Zimmer said that he attended to that that morning. And that that equipment has got to be such that those engines will run, and those brakes will operate in all kinds of weather, and where they carry passenger trains and freight trains from Cheyenne west and east, there is no use talking about that air brake being one that would not work. It had to work; they worked, where if they failed to work, it would have involved the life of a whole passenger train, or all the lives that might be involved in a freight train wreck. They have to have attention of course, so they will work in that kind of weather, and Mr. Zimmer told you what was the matter, and what happened to this engine. He told you that on account of this leak above the cylinders that apply the brakes directly to the wheel, that some ice accumulated there, and he had to thaw it off, and he would not run it if it would not work.

Now there is one or two instructions here that I want to call attention to, because the law in this case is such that when you take these instructions you will have to spend about as much time as upon any instructions that were ever given to a jury. This is not an ordinary proposition they have injected into this situation that if those brakes weren't working, and they depend upon Matthews to prove they weren't, then the railroad company could not say against this man that he assumed the risk, even if he walked down there in this steam and smoke; and hence it is that you have Mr. Matthews' testimony here to show that the brakes weren't working and get rid of the assumption of risk, so that it is important that the brakes weren't working,—it is very important to their case.

Well the court has told you here, when you take a witness who has told you what was not true, it is your duty to regard that as not true, and you have to decide this lawsuit upon the evi-
767 dence, and not upon arguments, and not upon suggestions, but upon testimony. You may take Mr Riggs, and Mr. Borton and Mr. Orton, the other engineer who went down there,—he didn't walk down between the rails of the main line, and nobody else did, and you must take all their testimony, and consider that and weigh that against the testimony of Matthews. And then find out which of those people are telling the truth.

Now I want to call attention to one or two instructions. There were a lot of rules offered here in evidence, and I haven't time to read them but when we finally get through, this is what the court tells you. (Reads certain instructions.) They apply simply to cars, and the court has in his instructions told you that rules apply only to cars and not to a person walking down the main track. (Reads another instruction) Now just take that instruction and apply that to all this mass of stuff and testimony you have here. That is the engine upon the track, and the place it must be, and here is a footman walking into a dense cloud of steam and smoke between the rails, and they say we didn't stop. But he should not have gotten there. And if a man walked up and stuck his hand into an electric fan in the railroad company's office, then you would not think the company was to blame. Well this man walked into that cloud of steam and smoke in the main track, and he took the risk of it. He knew that he could only run into one of two things,—a car or an engine on the track. They say we are to blame because we did not know he was there. They can't have him lost,—no, that pretense won't go. The engineer who had the other engine testified to it. Nobody got lost,—Mr. Johnson, the road overseer,—the man who had charge of the yards, told you about his working through the yard all day, and Mr. Matthews says that the main rails of that track were distinctly to be seen,—he could see them distinctly. Now we have that situation. We want to know whether when all these witnesses say that that engine was in good condition, and
768 that that bell was working, and the brakes were working, and we have a man who does not work for the railroad company,—Mr. Clark, who represents the city of Sidney, in its electric light service,—who has been in the service of that company almost since this accident, he examined that engine that very day, immediately after the accident,—who testified here that that brake appliance was in good condition,—you must say that that is not true; that Matthews told the truth, or you must say that that brake was off, or disregard the testimony. Supposing there wasn't any brake or any bell at all, did that contribute to this man's injury? He wasn't seen,—he got run over before they knew it. If they had had the best brake that ever was applied upon an engine, what difference would it have made. The tender had run over him, the front wheels of the tender were passing over him, before anybody knew that he was under there. What kind of brakes would you have on that engine that would have prevented that accident? What would

you suggest? One that would act retroactively, and pick that engine up and put it back down the track, and put the conditions as they were before he was run over. He had been run over before anybody knew anything about it.

Now you can take this situation, no matter what they talk about there, the brakes haven't anything to do with his injury,—not a thing. Not a thing. He was run over and the engine passed over him before they knew it, and they applied the brake and stopped it as soon as they could.

Now, gentlemen, I am going to leave this case with you at this point, and with this suggestion, that you must take Mr. Matthews' statement that he made before, the one that he went in and gave Mr. Foster, that young man, who testified that he took the statement down on the typewriter as that man gave it to him, and Mr. Matthews' statement that he signed that, when there wasn't anything on it, when it was blank. Either Mr. Foster or Mr. Matthews on that proposition was misrepresenting. And you have all the testi-
769 mony of these witnesses who worked around that engine. Clark and Schroeder, and the man whose duty it was to inspect the accident. You have Mr. Clark who works for the city out there, disinterested as far as this lawsuit was concerned, or as far as the Union Pacific was concerned,—Dupont who does not work for us, but down in Missouri for another railroad Company, and Borton and Nicholson and Riggs, and they you have against all that, what? Why, Matthews. It has only been a disputed question of fact, and you said in the opening of this trial, that if you were made the judges of the fact, that you would decide that question without regard for who the parties are to this lawsuit. That is what we asked you to do,—to decide it as you would decide it for anybody. I thank you gentlemen.

770 (*Argument of Mr. Rose to Jury.*)

Gentlemen of the Jury: The evidence presents the story of a tragedy in which a locomotive engineer was stricken down in his early manhood at his post of duty in the service of perhaps the most powerful and most ostentatious and most imperious transportation organization in the whole world.

Fred Huxoll belonged to the army of engine men, the silent heroes who stand alone and shoot holes through the night at the speed of a mile a minute. And the occasion recalls the importance of the service that is rendered by the locomotive engineer in the transportation and commerce of this great country. His life is like that of a soldier; he must be ready at all times to answer the call to duty and to service. He is stationed at the front of a column, in charge of the motive power, with his hand on the throttle, and an intent look-out ahead; to travel with the speed of a thunder bolt, while he is facing the night, and the storm, in all kinds of weather, and in all seasons, looking ahead often into unknown perils, where danger lurks in every rail and tie, and death stands watch at every bridge and culvert. He has the responsibility absolutely, not only for his train

equipment, that involves the expenditure of a fortune, but also for the precious lives of his comrade trainmen, and the passengers that are above price.

One Sunday night a number of years ago I attended divine service at St. Paul's church, in Lincoln, * * * When there was a blizzard blowing, like the blizzard of that Sunday on which Fred Huxoll lost his life, and I recall after all these intervening years, the prayer of Dr. Fletcher Wharton, then pastor of St. Paul's
771 here, for divine aid and sustenance for the locomotive engineers, who on that night stood facing the storm, peering intently ahead into drifts and perils they knew not of, with their hands upon the throttle in control of the motive power, and holding in their keeping the sacred lives of the train crew, and of the hosts of the traveling public, some of whom were impelled on that Sunday night, to rejoin loved ones; others to succor those in sickness and distress and some perhaps to answer the death summons of a loved one. I have never forgotten the petition that went up to the throne on that night. I have learned in my railroad experience, in the experience of my profession, since then, that there are times when a locomotive engineer's obedience to his running orders that are given him in writing, may bring him to face disasters that nothing but divine aid can avert. I have learned since then that there are times when his conduct must be as brave and heroic as was ever that of Napoleon, or his immortal marshals, Murat, and Ney on the fields of blood and carnage in the great battles that were fought incidental to the French revolution.

We are about to close the trial which is to determine whether this widowed mother, formerly the wife, and the orphaned children of Fred Huxoll, are to be recomposed in any degree, or to what degree for the taking away from them of the staff and the support of their loved one; who provided the shelter to protect them from the storm, and who provided clothing and sustenance for them to the last day that he lived.

If we go back now to Wednesday, the 28th day of December, 1910, we will find this little family intact in their * * * cottage home at North Platte. The sun shone as brightly upon that home as it did upon yours and mine upon that day. As is ever the case with the engineer, Fred Huxoll must pursue his work, and render the service of his calling to aid in carrying on the commerce of
772 this country. To answer a call to service, he takes leave of his family, leaving perhaps with the imprint of a loving good wife's kiss upon his lips and perhaps with the imprint of baby fingers about his neck. He expected to return and be with them no doubt to celebrate a happy New Year.

A message comes to that little cottage that brings the intelligence that its humble hearth stone is darkened, that the wife who leaned on Fred Huxoll, is a widow, and that those little children whom he loved are orphans. It has been the subject of criticism of the conduct of this case, that these little tots here are permitted to run about the court during the trial of their case. Is it demoralizing that the administration of justice shall take place in the presence of these lit-

tle ones, of whom it has been said: "For of such is the Kingdom of Heaven." It has been the subject of criticism that this widowed mother is here with those children. Since when has the influence of a good woman been regarded as corrupting in the administration of justice?

Over at the Louvre in Paris there hangs a picture before whom the traveling hosts of this whole world stop and uncover, and what is that picture? It is the picture of Mary Magdelene, kneeling at the feet of Christ. Has there ever been known an occasion or a time in history when the presence of a good true woman would corrupt the pure foundation of justice, or where this fount-in would be befouled by the presence of little children? No, those are incidents that are unavoidable. These people have a right to be here.

Before we speak particularly of the evidence in this case, I want to run over hurriedly, not in detail, some of the suggestions that have been offered here, which fairly represent the argument with which this great Railroad Company opposes the suit of Mrs. Huxoll
773 and her children. First it is said by counsel, who gives himself a certificate of candor, who must needs certify to his own purpose here, to tell the whole truth, that you should not permit a recovery in this case, because this lawsuit had its origin out in Bitter Creek, Wyoming. Now is there any issue of that kind here in this lawsuit? Is there any foundation for the statement of counsel? Where did Matthews live? Why he lived in Sidney. Where did Ella Huxoll live? In North Platte. Sidney is in one division of this great railroad, and North Platte, the end of another division, at least for freight purposes. Is there any proof here that Ella Huxoll had ever seen Charles D. Matthews when this suit was brought? Is there any evidence here that her counsel had ever seen him? Or that there was any interview at anytime between Ella Huxoll and her counsel, and Charles D. Matthews? If there is, you find it.

Mr. Miles says, that it is their duty, to bring all the proof they can to elucidate these questions, and when this great railroad called Mr. Hoagland on the stand, and we sought to ask him by cross examination, whether he had ever met Matthews, he said, "No, no no." Now didn't we ask him that? They said confine your questions to cross-examination, and so the question wasn't answered, was it? Did they go to the depositions taken here to ascertain whether or not long after this suit was commenced Matthews was discovered by inquiry made in taking the involuntary deposition of the company's own employees, and thus located? What proof is there that we have brought this suit in reliance upon his testimony? Nothing. It is admitted in the answer here, that the first step in this law-suit was taken in May, 1911, months before this road discharged Charles D. Matthews from its service. Read the instructions of the court,—the admissions contained in the answer that the first step in the beginning of this suit, the appointment of an administratrix, who is qualified as a personal representative to sue; the instructions of the court
774 already read to you, will tell you what? It is admitted that that appointment, was made in May, 1911. Now it is said

again that we should not recover in this suit,—mind you I do not discredit Matthews; I think Matthews told the truth,—I want to stop long enough to say that. But it is said again that we should not maintain this suit because we have had the affrontery to prosecute here in Lancaster county one of the greatest railroad centers in the State of Nebraska, where there are more railroads and more employees than there are in any city of equal area within the state. Whence comes the suggestion that these inpecunious suitors here can outmatch and outrun the great Union Pacific Railroad, if it tries its suit in Lancaster County? This little woman here who is left without a husband and without support, with the purchase price of her little home, partly undischarged, must have wonderful power that eminent counsel must needs warn the jury against her because of her unequal ability to command influence against all the great resources of this great railroad company. Now what is true? We have a statute in this state, that says we can sue a defendant in any county where it can be found or summoned. We can sue this defendant in any county in which it has a railroad station, in which it operates a railroad, under the statutes of this state, because by our statutes we can serve them there. If we would rather try this case before his honor Judge Cosgrave of this court, and in this county where the U. P. influence is not greatly dominative in our opinion, if we prefer to do that rather than to go to North Platte, where Ella Huxoll lives in a railroad town, and a U. P. Railroad town, and to try it there before Judge Grimes at North Platte, we may do so under the law. We don't have to disclose to this jury our reason. We have a right to go wherever we think we can get a fair trial, and the rules of evidence, and the rules of law, by which justice is administered, are the same in Lancaster County as they are in Lincoln County, or what is the other county there,—or Cheyenne County where Sidney is located. What is the signaficance of bringing this suit four hundred miles from Sidney? Suppose gentlemen we had brought it at Sidney? Now let us just look at this argument and see how obstructive to the true administration of justice, bright insinuating counsel can become * * * If Ella Huxoll had sued at Sidney, she would have had to go with her little babies and counsel from North Platte, into another railroad division. Why Sidney and North Platte, are not close together. There is a long stretch of territory and a long line of this great Union Pacific railroad * * * between those two towns. It did not make much difference to Ella Huxoll whether she brought the suit in Sidney or in Lincoln, but some friend of hers told her she had better come to Omaha, and get Mr. Rose to assist her, with Mr. Hoagland, and she came there and I said why I have practiced law, 21 years in Lincoln, I am an old resident there, and I know the people there, the people there know me; they know whether I will be fair or not The personality of a lawyer has something to do with a lawsuit. We did not want to try it in Omaha, where they have their great palatial office building, and their headquarters, and the president, and the heads of all the departments. Those are reasons why

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we should seek to side-step Omaha. Why, let us come to Lincoln, where I know the people and where I swear by them every day, and where I promise you that justice shall be fairly administered, even in favor of a humble widow against the greatest railroad Company that exists and I take the responsibility personally for bring- this widow and her babies to the court at Lincoln, where I have spent my active professional life. There is nothing presented in that argument but brow beating insinuation, and bull dozing. Now does that appeal very much to you in this particular case?

I might mention another circumstance. You are reminded here of your oaths of office. Counsel from Sidney, Cheyenne
776 County, wonders whether people have been hired here to watch things. Counsel appealed to you for a fair and impartial trial. Now I want to say to you, if you know of my speaking scarcely, to a single juror; if you know of an occasion when either myself or my associates didn't act as though they were trying almost to shun the jury, to avoid the very appearance of evil, speak out against me. Why I have pursued that course almost to the point of incivility sometimes. If you know of any man sent by Ella Huxoll or her attorneys to interview you and to suggest to you what you ought to do by your verdict, speak out against us. If any man ever approached a single juror in this case, he comes not from this obscrue little plaintiff. Did anybody ask you for plaintiff to be good to her or anything of that kind? If they have, expose them, and I will stand before this court and urge their punishment; if it be my brother or sister I will do it. I join the gentleman in the request for a delivery by this jury according to their honest judgment, in response to their honest impulses as they shall look upon this evidence. Why surely that is the kind of a verdict we want, and that is the kind of a trial we want. And I want to say to you if the time has come when this woman on account of her poverty cannot get a verdict for herself and her little ones free from extraneous influences that represent the honest judgment of the jury, in response of the impulse of your hearts from this testimony, as you view it and look on it, then we had better dispense with our system of justice, * * * turn the administration of justice over to Satan and be done with it. Why bless you, that is what I am pleading for, just a fair trial, and you are going to give it to me. You are not going to let any sordid motive or any motive of fear or favor swerve you a hair in this case, from the path of duty. Who has asked you to swerve from the path of duty in this case? It wasn't Mr. Comstock and it w-sn't myself. Mr. Miles says that we should not have any recovery in this case, because Mr. Huxoll
777 walked on the main line track. Did he get the court to so instruct you? The fact is, that it is only a little while since the courts of this country allowed these transportation companies to select their own equipment and said they might use the equipment that was in general use in their business of their own selection; that they might pursue the methods that were in common and general use and there was no negligence in it. It is only a little while ago since the courts of this country made a man who was injured, or

his representative, when he was killed, responsible for the acts of a co-employee over whose employment or continuance in employment, the suitor at the court had no control whatever. The law used to deprive him of all control over who should be his comrades at work, and at the same time made him responsible for the negligent acts of the fellow workman by his side, who, though incompetent, was selected over his head, and protest, by his master. It is only a little while ago since the court said to juries, and sometimes they peremptorily instructed verdicts on the same ground, that if looking at the situation as it presents itself to you, in the face of emergency, you have chosen the poorest way, or you have acted on some mistaken judgment, the risk of using the best judgment, is on yourself. It is only a little while ago, if the servant knew that something was out of fix and trusted that the employer have it working right, the workman, if it actually endangered his life, assumed the risk of his master's negligence by merely continuing in employment. Why, a protest went up over this great country, from those whose breasts heaved with impulses of humanitarianism. The people of this country said, must we go on, with the sacrifice of life, in hauling the commerce of this country. Must this perpetually continue, must we go on taking the support from wives and children, and making them widows and orphans? Is the commerce of this country so sacred that we must keep it up at such a ruinous sacrifice of life? And then the first legislation commenced, early in
778 1893, in the Congress of the United States, at the first of Mr. Cleveland's last term of office, as President. That was the safety appliance act to which your honor has called attention. The leader of that act in the Senate was Senator Cullom of Illinois, and the man who made the amendments and helped Senator Cullom to push it through was the present chief justice of the United States, who was then a member of the senate, and in the House of Representatives, I am proud to say, that the Congressman sent from this District, and who lived in Lincoln, the Congressional record shows at one point in the proceeding, before the House, took the leadership of that bill, and urged his associates in Congress to vote for it, because it embodied right humanitarian impulses. I need hardly mention the name of Mr. Bryan, one of the men actually responsible for the passage of the first safety appliance act that was ever passed in this country by the Congress of the United States. Now I have read those Congressional debates, every word of them and I went all over the proceedings, and searched out every scrap connected with that legislation from the Congressional Record, and I did it when I was serving for a salary, the law department of a great railroad.

Now the courts have construed those Acts of Congress. That was supplemented as late as 1908, by the specific act under which this case was brought. That was very recent. It used to be said, that if any of your negligence contributed to your injury, you cannot have a recovery; your widow and your children shall be beggars, if you were even slightly negligent, no matter how small. Now that used to be the law. And when we look at it now, I am glad to be

able to tell you that those rules are gone, and forever. They belong to the history of a barbarous past in railroad operation in this country. They are not of the glorious sunlight of to-day.

Well then, what is the rule to-day? Why, contributory negligence does not bar a recovery any more. The court has told you
779 that. We do not have to show, as we were previously required to do in the trials, where all those bickerings and insinuations were made, we do not have to convince the jury that the sole and only cause of the wrong was the negligence of the defendant. No, that rule was exploded by the beneficent act of Congress. All we have to do is to show that this death resulted, in whole or in part, from the negligence of this company, its servants or employees, or any deficiency in any of its equipment named, —naming over a long list of things that may be the object of a cause of action, if they are insufficiently provided or maintained. Now that is the law under which we are operating to-day; but this company, with all its arrogance, and unwillingness to submit to the advance in modern legislation, at the very start in this case, and in the opening statement and final argument, has urged to you the old exploded doctrine, behind which this company can no longer hide, and that has been its whole case.

Have they presented anything that went against recovery? Really now, when we look this action in the face, we know that this company cannot now select any appliance that it sees fit, that other railroads employ, as it used to do. But the Congress has said: You must equip it thus and so: And among other things Congress has required the power brake. Now what is the power drive-wheel brake? Railroads must not resort any more to hand brakes. The progress of inventions, the progress of the art, has developed safer means, and the railroads are required to adopt and to live up to the progress of the art; that is all. They must always be a little behind the progress of the art. But the Congress never compelled the adoption of these safety devices until the progress of the art of train operation had first shown their practicability. Now why do they say that the power brake was working in this train? Of course that is not the sole ground of recovery here, not by any means. Why they produced the engineer that brought
780 it in from Cheyenne at 5:40 in the morning. They produced the round house man, to whom they made the report at that time, and they say we had a brake that worked. Mr. Strode says it had to work. Well, are we making any contention in this case that the brake did not work at 5:40 in the morning? How is that material in this case? If we alleged that brake did not work at 5:40 in the morning, could we recover on that? No. We allege that it didn't work at the time of the accident. Now let us see how much value is that suggestion in this case. The testimony of Matthews and Zimmer, who comprised the engine crew, concurred in the one point, that after it was brought in, and after this certificate of good health was given to the brake, that it was totally incapacitated. Zimmer may not have used the word "Totally", but that was the expression of Matthews; and the expert

Mr. Mars, says, on the stand, if there was a situation which necessitated the thawing of it by a torch which they employed, that the device was totally disabled. Now we know that it was disabled at 8 o'clock. Now what do you think of the proposition of a man here giving himself a certificate of fairness, and telling you in his own behalf, of the value of his developing the truth here, and then undertaking to say that the condition at 5:40 would lap over the period of 8 o'clock and prove that the engine was in good working order, so far as the brake was concerned at 11 when the accident happened? You see that the condition at 5:40 has no application at all. They are trying to railroad something in here that does not reach any issue. The power brake was out of commission. It is immaterial about any little details. Matthews got mixed under the cross examination by Mr. Pettis. Defendant stood on the proposition of Mr. Pettis on the last trial, so far as the reading of Matthews' evidence is concerned, that frost could not disable this air brake. So we called Ernest Tramp on the stand, and then we called Charles Finch, a man who has lived in this city for more than twenty years, whose record is known here, as Mr. Strode would like the record of all the witnesses to be known to you. And Finch said this: The
781 process of compressing air, lets loose a lot of free water in the atmosphere, and that collects in the air drum. This device is out to the weather, and wherever there is water in temperature that is 15 degrees below zero, there will be ice, unless you keep the ice from forming by artificial heat, and when the wind is blowing, this device is not near enough to the boiler so that the heat of the boiler amounts to anything. And Mr. Mars said: Whenever you freeze water in a valve, whenever you put ice in a valve, or in a switch or any appliance that is intended to slide, you put the whole thing out of commission. That valve is made to fit, and fit air tight. When you put ice around it, how can it move? Why, the congealing ice absolutely fastens it. Now the truth is, it never was thawed out. Any report made after this accident would be of no consequence, and the one reason it would not be is for this reason: This engine was housed after this accident, and this man Clark, by whom this railroad sets so much store in this case, says he may not have seen that engine until 4:30 o'clock in the afternoon. Where was the engine meanwhile? Housed in the round house, protected and sheltered from the cold, where a dozen fires were sending out their smoke and steam that obscured that track in front of the round house.

What do you do when an appliance is disabled by ice? Clarke made an unintentional mistake, and said 2:30, stated, from one to 2:30. That it had been in there where the fires were burning, and furnace blasts were sending out clouds of smoke, where the wind was removed from it. Now what is the significance of its working at that time? Suppose there had been nothing but ice in there, why under the influence of that heat, ice is converted back into water, and the very cause of the disturbance would be removed, without any operation of repair, or nothing else.

Now Matthews knows the story. He tells it right, and when he

was here, meeting the last jury face to face, and meeting
782 skilled counsel of this road, he said the brake was frozen up,
and he said the bell ringer was frozen up. That was the condition of the braking appliance. By the Act of Congress, if Huxoll had been never so negligent in going up that track, there may be a recovery, even if the condition of this engine was not the sole cause, but merely contributed to his death. I think his injuries would not have been fatal, if he had had the help of a good braking equipment to protect him. You cannot ascribe to him contributory negligence or assumption of risk. The Acts of Congress absolutely forbid it, and the highest courts have said Congress has power to enact them, has power to make those provisions for the protection of the lives and limbs of the railroad employees of this great country.

I want to mention now, that Mr. Miles come here, where Judge Comstock and I have practiced all our professional lives, and suggests that there might be some misconduct of ours, or Mr. Hoagland, but I will not take any time on that issue. You may judge of my character and my candor, by my performance here in court. I have no word to say in certification of my own character. Judge me as you have seen me live and perform in this court, and determine from what you see whether I have been earnest and straightforward and square. And judge Mr. Comstock in the same manner.

But I want to mention a little incident here, because I think it was course, and that counsel went out of his way to make some insinuations against Senator Hoagland. His name stands as high in this state as perhaps any other man in public or private life. Occasion has been sought to criticise him, about his conduct on the stand. Now there is a little incident that I thought counsel would have been ashamed to mention. They called the Senator on the stand, and he told them frankly, he remembered the substance of the things said
on the occasion of taking a deposition, practically all of them,
783 but when asked for the specific words of a question an
said: "I have no independent recollection, but I th
were the words"; and when I examined him afterwards, th
said they were probably correct. And then we showed afte
the same thing applied to the whole deposition, and offere
late that the whole of it was substantially correct. Well, Mr. Strode wanted to prove two or three questions only, and to discredit the rest of it. He was afraid that we might read some of the rest of the deposition to show that Matthews' whole statement on the subject was consistent with his testimony here. Now who is trying to be fair on that proposition? That was not the only instance. We had an incident early in the trial here, where we pushed Mr. Strode right up to the proposition that a rule should be applied reciprocally, and he wiggled out of it.

Now Mr. Strode said further that "I am the man that brought this testimony before you. You just look at me. I brought all this testimony here from North Platte. When you see what I have done, why you will see that I am the man that is trying to give you all the light." Well, could we bring those witnesses from North Platte? I

am going to show you what he has done. If you had been accustomed to the trial of lawsuits and to the scrutinizing of conduct in court, you could see in a moment that instead of having that open manner, he has conducted this case with diabolical cunning. But he says he brought the witnesses. Did he bring switchman Hower here to look this jury in the face, and tell them of the conditions that surrounded this accident? No. Howe's name is mentioned over and over again here. Did he bring Conductor Fletcher here? Conductor Fletcher, whose answer of what he did, in regard to flagging through smoke and steam, was not admitted because of the objection of counsel,——

784 Mr. Strode: Except to the counsel's remarks. I except to the reference of Mr. Rose, to the testimony of Mr. Fletcher, being objected to by counsel, for the reason that the objection was sustained, and reference to the objection would be misconduct on the part of counsel and improper.

Mr. Rose: I will say your honor, the only reference I am going to make to that is to answer his suggestion, * * * that his conduct was highly virtuous, and that having brought these witnesses here, it should be presumed he was going to give us all the light he could.

Objection overruled. Exception.

Mr. Rose: When he pretends here, that he is trying to give you everything for and against his company, he has overlooked the fact that he didn't call conductor Fletcher here,—and in that connection to show who he is, I want to challenge your attention to the fact that he successfully objected to our * * * reading the deposition, giving the answers to questions as to what he did, in going through steam and smoke.

Mr. Strode: I want to except to it.

Mr. Rose: He didn't bring engineer Orton here, whose name was ed over and over again, in this testimony, and he didn't rks the night engineer. * * * who is now in the serv- government of the United States, did he? He has just he witnesses here that served his purpose, contrary to his . n. And these witnesses he has brought here, he has only ked concerning facts in respect to which he thinks the witness will answer in his favor. On other important facts, he has failed to question them, and then has argued successfully against inquiry into other matters on cross examination.

Now take the witness Dupont, who was very perky when he started, and went off with his head hanging, and who had to finally admit that he told a different story to this widow and to Fred

785 Huxoll's uncle, on the second day after this accident. Was any inquiry made of Dupont as to the accumulation of ice about the water crane? Borton was questioned on how much the crane leaked there, and how much ice there was around it. Borton said: It just splashed a little. Other witnesses who had been about the crane were called. Did you ask them sir, or give us an opportunity for cross examination on the question, as to what they knew about the accumulation of ice and snow there? Did you not

designedly prevent our inquiry upon that important issue? Now when a man gives himself a certificate of virtue, and wants this jury to say that he has given them every thing; that he is the man whom you should regard as the embodiment of virtue and justice, you may justly take this course of conduct into consideration. I will give you another instance that to me is almost shocking, although counsel kept within his rights. I do not mean shocking in the sense that he has to be disciplined or anything of that kind.

You remember that we had the testimony here that it was customary in the switching operations of that yard, to station a man on the footboard. Well now, I do not know whether you appreciate it or not, but do you know that custom has never been denied by a single witness in this lawsuit? Maybe the jury does not appreciate how that was handled. I will give you a sample of Mr. Strode's inquiries on that subject. He asked the witness: "Is it customary to station a man there for the purpose of warning pedestrians?" He would not ask it any other way. He never asked a witness if it was the custom to station a man on the footboard. I almost think he intended to put a wrong inference upon the answers. No question he asked of any witness on that subject omitted the qualifying words: "for the purpose of warning pedestrians." That is what we call in pleading a negative pregnant; that is to say, it is not a denial of the issues which we have presented. Counsel knows that; but he put that qualification into his questions to his own witnesses,
786 so as to force the witness to answer "No." Once in a while a witness answered: "Yes, sir, there was such a custom as that. Yes, sir, I have seen men ride on the footboard in front." Then counsel would ask "Is that for the purpose of warning pedestrians?" I suppose if it was customary for a man to be stationed there for any purpose, it is his duty to avail himself of his observations for all purposes. The court has instructed what the duty of the company is in that behalf.

I will read one question and answer of Matthews:

"Now what was the general practice and custom in reference to flagging through steam and smoke, which was sufficiently dense, to obscure the engineman's view of the track ahead?" A. "The custom was to stop and send the flagman ahead." Now none of that was done in this case.

Gentlemen of the jury, if Riggs and Borton and Nicholson told the truth what is the situation * * * presented in that yard? Here was a day when they could not see the track. There was a busy yard, a division station. This is not a picture of the yard, (referring to blue print on the front of judge's desk).

The correct exhibit of that yard, is another exhibit, and that is put up there by a man who understands *psycology* to lead you away from the true print. What, is the yard like that, a division yard? This is the true one. (Referring to plaintiff's exhibit of the yard). They put those particular tracks in there away from the others. I remember down there in the Burlington yards, they have a place in the yards, they called the puzzle. They are hiding the bull-rings and puzzles by this, and trying to get you to think he was keeping it

there to help you; had the bailiff take it down and put it up every day.

Here it is, track after track eliminated. As a matter of course, it is explained, it is all right, but why is that paraded in that way from day to day? To give you the impression there wasn't much danger there.

787 So if their theory is correct, you put that engine out where no man can see the way ahead, where no man can tell what obstruction may meet it, it may be a passenger train, and it may be a footman, and it may be what not. What do you have to rely on to avoid collissions, when you come together like they did in the case of Huxoll. Gentlemen, the impulses of humanity, which are written in the acts of Congress here, forbid in my judgment, the moving of that car an inch, under those circumstances. They should do just like Matthews said, send a man to examine ahead, and see if everything is all right, walk ahead until you see day light. That would have saved Huxoll's life. All of those things are going to be submitted to you, all of them. There is one other thing or two, that I wanted to mention, but I see that I can't get over it, and I am going to quit, I had not intended really very much to discuss this evidence. It took the court forty-five minutes to give you the law of the case, and I could not go over it in detail, and I wanted to give you this general view to guide you in the controversy. I want to speak briefly about the measure of damages.

Now gentlemen of the jury there is nothing in this defense except brow beating and bluff and bluster; that is absolutely the only thing that is proposed. Just an effort to throw dust in your faces. The Congress of the United States has done its duty towards this widow, and these orphan children of Fred Huxoll. His honor upon the bench has done his duty. They will be recompensed, unless this jury fails of its duty. The last stand of responsibility in this case is this jury.

It cannot be ever said that there is not sufficient testimony in this case to justify a recovery, for in every law suit, the Court has a preliminary issue to determine. He must determine whether the evidence offered is sufficient to warrant recovery in favor of the plaintiff, and if it is not, he stands here between this widow and these children and the treasury of this great railroad company; be-

788 fore we come to you, the sufficiency of our prima facie case, is credited by the Court, and it is for you to say finally upon this evidence whether you will recompense these people for the losses sustained, and if you do, how much.

We have three beneficiaries here. First, there is little Fred, who bears his father's name. He was just one year and a month old when he was deprived of his father and his father's support. We see him running around here. We can imagine ourselves, how much he has developed and changed in the three intervening years, and how he would appeal today to the pride of that loving father, if his father could be here and see how that little fellow has developed. It is his only boy, and the father was yet in his young manhood. You are to say by this verdict how much Fred Huxoll would have given

in the way of pecuniary support to sustain this little one during the years of his dependance, to maintain a shelter over him, to clothe him and feed him and educate him, and send him out in this world when he comes to manhood to take the responsibility of life.

Well, now, I have a little boy today, just a year and a month old, the 27th of this month, next Monday, and I know just how Fred Huxoll could look upon that little fellow, when he kissed him good bye for the last time. He would get up any time of night,—when the little one first learned to lisp the name of "daddy," and when that call of duty came it never remained unanswered, if the father was in hearing. I tell you today, when I look in upon the little crib in my bed room, it would make me unhappy, if I should think that the night calls of daddy could never more be answered. Now, that is one of the things for you specifically to find, what this little boy who bears his father's name, might expect in pecuniary recompense during his long period of expectancy that was left for Fred Huxoll.

Then, there is little Marion, three years old. She was a little girl, longer dependent on her father, to earn the necessities of life, but was closer to her father and mother because of her very de-
789 pendence. What would not a fond father do in the way of pecuniary sustenance for a little golden-haired daughter just three years of age? Wouldn't he educate and clothe her and train her? Wouldn't she be the apple of his eye, so long as she was by him? What would he not do for that little girl? Think that over. The proposition here is for you to recompense her for the loss of the dear, good, kind and loving father, who was a young man, not too old to enjoy the impulses and sports of childhood.

Then again, there is Ella, whom he took in the innocence of her young maidenhood, when he himself was only twenty-four, to his bridal chamber, and felt her fluttering heart, beat, like a dove in captivity, when for the first time he pillowed her head on his shoulder. She was the wife of his bosom. In the five years of their married life, she had delivered him these two sweet little babes, as pledges of her love. The testimony shows that he trusted her with his entire earnings. Why, I don't remember a family situation in all my experience, where there was the same degree of trust shown by the husband to the wife as was developed here upon the witness stand. Ella looked after the babes and did her duty, who got all the wages and spent it, part of it for the living and part of it to pay monthly installments for the little cottage home which sheltered them from the night.

Counsel says that we ought not to recover in this case, because they at once obtained statements of these witnesses. Now, let us see what they did, and then I am done. Did these men make their voluntary *voluntary* statements? No, The company sent to them a claim agent, who had practiced law in Kansas, cunning and astute, and had him take out of their hands the preparation of these casualty reports, to commit them in ex parte statements to facts and theories, to stop and prevent this successful prosecution of the claim for recompense.

Look on the other hand when L. E. Johnson was there. Where

are the other parties to this controversy? If I had the fluency of
our present Chief Justice of this State, I would paint for this
790 jury a word picture such as I have seen and heard him paint.
When you are weighing these things. I just wish I were an artist to put before you the contrast of the situation that was there. On one obscure corner of the canvas I would have a picture of this little cottage home with the mother and children weeping over their dead, their sacred dead, the head of the family, whose love had provided shelter and sustenance, undone, unnerved, helpless. And on the other hand, I would paint the picture of the ostentatious railroad, with its * * * sleek, trained claim agents, going out to the men, and the only men, who could give up the facts that would get them redress for the loss that cannot be recompensed in money. I would have him in his private room in the hotel, writing the statements and getting them signed in that very presence of mourning. Keep that in your minds, and take this case and do just what you think is right.

791 (EXHIBIT 1.)

The above exhibit was the Letters of Administration identified at the time of the trial, but not offered, but this reference is made to it, and this page inserted, so that the record will be kept straight, and counsel will not think exhibit is missing.

(Here follows map marked p. 792.)

793 (Exhibit 3 attached to this sheet.)

EXHIBIT No. 3. Calvin A. Emery, Court Reporter, Lincoln, Nebr. Second Trial.

Union Pacific Railroad Company (Lines East of Green River).

Rules and Regulations of the Transportation Department.

Revised Edition August 1st, 1907.

No. 7263.

EXHIBIT No. 2. Calvin A. Emery, Court Reporter, Lincoln, Nebr.

This Book is the Property

of the

Union Pacific Railroad Company
(Lines East of Green River.)

And is Loaned to

Name	Occupation
.....	.....
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who hereby agrees to return it to the proper official when called for, or upon leaving the service, or forfeit one dollar.

EXHIBIT No. 2. Calvin A. Emery, Court Reporter, Lincoln, Nebr.

EXHIBIT No. 3. Calvin A. Emery, Court Reporter, Lincoln, Nebr. Second Trial.

Union Pacific Railroad Company (Lines East of Green River).

Rules and Regulations of the Transportation Department.

The rules herein set forth govern the railroads operated by these companies and shall take effect August 1st, 1907, superseding all previous rules and instructions inconsistent therewith.

*Rules prefixed by simple numbers refer to single and double track; those with the letter "D" before a number and in heavy type refer to double track only.

Special instructions may be issued by proper authority.

W. L. PARK,
Gen'l Superintendent.

Approved:

A. L. MOHLER,
Vice-President and Gen'l Manager.

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General Notice.

To enter or remain in the service is an assurance of willingness to obey the rules.

Obedience to the rules is essential to the safety of passengers and employes, and to the protection of property.

The service demands the faithful, intelligent and courteous discharge of duty.

To obtain promotion capacity must be shown for greater responsibility.

Employes, in accepting employment, assume its risks.

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General Rules.

A. Employes whose duties are prescribed by these rules must provide themselves with a copy.

B. Employes must be conversant with and obey the rules and special instructions. If in doubt as to their meaning they must apply to proper authority for an explanation.

C. Employes must pass the required examinations.

D. Persons employed in any service on trains are subject to the rules and special instructions.

[* Paragraphs beginning with an asterisk in bold-face type in copy.]

E. Employes must render every assistance in their power in carrying out the rules and special instructions.

F. Any violation of the rules or special instructions must be reported.

G. The use of intoxicants by employes while on duty is prohibited. Their use, or the frequenting of places where they are sold, is sufficient cause for dismissal.

H. The use of tobacco by employes while on duty in or about passenger stations, or on passenger cars, is prohibited.

J. Employes on duty must wear the prescribed badge and uniform and be neat in appearance.

K. Persons authorized to transact business at stations or on trains must be orderly and avoid annoyance to patrons.

L. In case of danger to the Company's property employes must unite to protect it.

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Definitions.

Engine.—I locomotive propelled by any form of energy.

Train.—An engine, or more than one engine coupled, with or without cars, displaying markers.

Regular Train.—A train authorized by a time-table schedule.

Section.—One of two or more trains running on the same schedule displaying signals or for which signals are displayed.

Extra Train.—A train not authorized by a time-table schedule. It may be designated as—

Extra.—For any extra train, except work extra;

Work Extra—For work train extra.

Superior Train.—A train having precedence over another train.

Train of Superior Right.—A train given precedence by train order.

Train of Superior Class.—A train given precedence by time-table.

Train of Superior Direction.—A train given precedence in the direction specified in the time-table as between trains of the same class.

Note—Superiority by direction is limited to single track.

Time-table.—The authority for the movement of regular trains subject to the rules. It contains the classified schedules of trains with special instructions relating thereto.

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Schedule.—That part of a time-table which prescribes class, direction, number and movement for a regular train.

Division.—That portion of a railway assigned to the supervision of a superintendent.

Subdivision—District.—A part of a division so designated on the time-table.

Main Track.—A track extending through yards and between stations, upon which trains are operated by time-table or train order, or the use of which is controlled by block signals.

Single Track.—A main track upon which trains are operated in both directions.

Double Track.—Two main tracks, upon one of which the current of traffic is in a specified direction, and upon the other in the opposite direction.

Current of Traffic.—The movement of trains on a main track, in one direction, specified by the rules.

Station.—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.

Siding.—A track auxiliary to the main track for meeting or passing trains, limited to the distance between two adjoining telegraph stations.

Fixed Signal.—A signal of fixed location indicating a condition affecting the movement of a train.

Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which

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movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations.

Yard Engine.—An engine assigned to yard service and working within yard limits.

Pilot.—A person assigned to a train when the engineman or conductor, or both, are not fully acquainted with the physical characteristics, or running rules of the road, or portion of the road, over which the train is to be moved.

Under Control.—To be able to stop within the distance track is seen to be clear.

Standard Time.

1. Standard time obtained from official observatory will be telegraphed daily to all points from designated offices at 12 o'clock, noon, at Naval Observatory, Washington, D. C.

2. Watches that have been examined and certified to by a designated inspector must be used by conductors, enginemen, flagmen, brakemen, firemen, yardmasters, engine foremen, agents, operators, section and bridge foremen, and such other employes as may be designated by rule or special instructions. The certificate in prescribed form must be rewarded and filed with Superintendent every three months.

(Form of Certificate.)

Certificate of Watch Inspector.

This is to certify that on —— — 19— the watch of —— ——, employed as — on the —— was examined by me. It is correct and

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reliable, and in my judgment will, with proper care, run within a variation of thirty seconds per week.

Name of Maker —— ——.

Brand —.

Number of Movement —.

Open or hunting case —.

Metal of case —.

Stem or key winding —.
Signed, —— ——, *Inspector.*
Address ——.

3. Watches of conductors and enginemen must be compared, before starting on each trip, with a clock designated as a Standard Clock. The time when watches are compared must be registered on a prescribed form.

Time-Tables.

4. Each time-table, from the moment it takes effect, supersedes the preceding time-table, and its schedules take effect on any division (or sub-division) at the leaving time at their initial stations on such division (or sub-division). But when a schedule of the preceding time-table corresponds in number, class, day of leaving, direction, and initial and terminal stations with a schedule of the new time-table, a train authorized by the preceding time-table will retain its train orders and assume the schedule of the corresponding number of the new time-table.

Schedules on each division (or sub-division) date from their initial stations on such division (or sub-division).

Not more than one schedule of the same number and day shall be in effect on any division (or sub-division).

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5. Not more than two times are given for a train at any station; where one is given, it is, unless otherwise indicated, the leaving time; where two, they are the arriving and the leaving time.

Unless otherwise indicated, the time applies to the switch where an inferior train enters the siding; where there is no siding it applies to the place from which fixed signals are operated; where there is neither siding nor fixed signal, it applies to the place where traffic is received or discharged.

Schedule meeting or passing stations are indicated by figures in full-faced type.

Both the arriving and leaving time of a train are in full-faced type when both are meeting or passing times, or when one or more trains are to meet or pass it between those times.

When trains are to be met or passed at a siding extending between two adjoining stations, the time at each end of the siding will be shown in full-faced type.

Where there are one or more trains to meet or pass a train between two times, or more than one train to meet a train at any station, attention is called to it by a heavy dash under figures, thus: 5:45.

*D-5. When there are one or more trains to pass a train between two times, attention is called to it by a heavy dash under figures, thus: 5:45.

6. The following signs when placed before the figures of the schedule indicate:

*[Paragraphs beginning with an asterisk in bold-face type in copy.]

"s"—regular stop;
"f"—flag stop to receive or discharge passengers or freight;
"¶"—stop for meals;
"L"—leave;
"A"—arrive.

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6 (A). The following signs when placed at left of station name indicate:
"DN"—day and night telegraph office;
"D"—day telegraph office;
"N"—night telegraph office;
"R"—register.
The following signs when placed at left of page indicate:
"W"—water station;
"F"—fuel station;
"I"—interlocking plant;
"T"—turn-table;
"Y"—wye;
"O"—track scales;
"P"—telephone;
Bracket opening to the right—block signals;
Bracket opening to the left—double track.

Signal Rules.

7. Employes whose duty may require them to give signals, must provide themselves with the proper appliances, keep them in good order and ready for immediate use.

8. Flags of the prescribed color must be used by day, and lamps of the prescribed color by night.

9. Night signals must be displayed from sunset to sunrise. When weather or other conditions obscure day signals, night signals must be used in addition.

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Visible Signals.

10. Color Signals.

Color.	Indication.
(*a*) Red.	Stop.
(*b*) Green.	Proceed, and for other uses prescribed by the Rules.
(*c*) Yellow.	Proceed with caution, and for other uses prescribed by the Rules.
(*d*) Green and white	Flag stop. See Rules 26-A and 28.
(*e*) Blue.	See Rule 26.

11. A fusee on or near the track burning red must not be passed until burned out. When burning yellow it is a caution signal.

11 (A). Fusees must not be placed on bridges, roadway crossings, sign boards, in center of track, or at places where fire can be communicated to structures or cars.

13. Any object waived violently by any one on or near the track is a signal to stop.

12. HAND, FLAG AND LAMP SIGNALS.

MANNER OF USING.	INDICATION.	
(*a*) Swung across the track.	*Stop.*	
(*b*) Raised and lowered vertically.	*Proceed.*	
(*c*) Swung vertically in a circle at half arm's length across the track when the train is standing.	*Back.*	
(*d*) Swung vertically in a circle at arm's length across the track, when the train is running.	*Train has parted.*	

MANNER OF USING.	INDICATION.
(*e*) Swung horizontally above the head when the train is standing.	*Apply air brakes.*
(*f*) Held at arm's length above the head, when the train is standing.	*Release air brakes.*

13. Any object waved violently by any one on or near the track is a signal to stop.

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Audible Signals.

14 Engine Whistle Signals.

NOTE.—The signals prescribed are illustrated by "o" for short sounds; "—" for longer sounds. The sound of the whistle should be distinct, with intensity and duration proportionate to the distance signal is to be conveyed.

Sound.	Indication.
(*a*) o	Stop. Apply brakes.
(*b*) — —	Release brakes.
(*c*) — o o o	Flagman go back and protect rear of train.
(*d*) — — — —	Flagman return from west.
(*e*) — — — — —	Flagman return from east.
(*f*) — — —	When running, train parted; to be repeated until answered by the signal prescribed by Rule 12 (*d*). Answer to 12 (*d*).
(*g*) o o	Answer to any signal not otherwise provided for.
(*h*) o o o	When train is standing, back. Answer to 12 (*c*) and 16 (*c*). When train is running, answer to 16 (*d*).
(*i*) o o o o	Call for signals.

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Sound.	Indication.
(*k*) — o o	To call the attention of yard engines, extra train or trains of the same or inferior class or inferior right to signals displayed for a following section.
(*l*) — — o o	Approaching public crossings at grade.
(*m*) ———	Approaching stations, junctions, railroad crossings at grade, and mail cranes located between stations.
(*n*) oo oo oo	Air brake sticking.
(*o*) o o —	Transfer of air.
(*p*) oo oo	Second engineman to assist in recharging the air.
D-14. (*k*) — o o	*To call the attention of yard engines or of trains moving in the same direction to signals displayed for a following section.

A succession of short sounds of the whistle is an alarm for persons or cattle on the track.

14 (A). Should a train fail to answer whistle signals as provided in 14 (*k*) and D-14 (*k*), the train displaying the signals will stop at once and personally notify them, and will report all such failures.

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15. The explosion of one torpedo is a signal to stop; the explosion of two, not more than two rail lengths apart, is a signal to reduce speed, and look out for a stop signal.

16. Communicating Signals.

Sound.	Indication.
(*a*) Two	When train is standing, start.
(*b*) Two	When train is running, stop at once.
(*c*) Three	When train is standing, back the train.
(*d*) Three	When train is running, stop at next station.
(*e*) Four	When train is standing, apply or release air brakes.
(*f*) Four	When train is running, reduce speed.
(*g*) Five	When train is standing, call in flagman.
(*h*) Five	When train is running, increase speed.

NOTE.—When a passenger train approaches a station at which it is to stop for an opposing train, the conductor must give one short blast of the air whistle immediately after passing the station whistling post, which the engineman must acknowledge by two short blasts of the steam whistle.

Train Signals.

17. The headlight will be displayed to the front of every train by night, but must be concealed when a train turns out to meet another and has stopped clear of main track, or is standing to meet trains at the end of double track or at junctions.

*D-17. The headlight will be displayed to the front of every train by night, but must be concealed when a train is standing to meet trains at the end of double track or at junctions.

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18. Yard engines will display the headlight to the front and rear by night. When not provided with a headlight at the rear, two white lights must be displayed. Yard engines will not display markers.

19. The following signals will be displayed, one on each side of the rear of every train, as markers, to indicate the rear of the train: By day, green flags; by night, green lights to the front and side and red lights to the rear; except when the train is clear of the main track, when green lights must be displayed to the front, side and rear.

*D-19. The following signals will be displayed, one on each side of the rear of every train, as markers, to indicate the rear of the train: By day, green flags; by night, green lights to the front and side and red lights to the rear, except when the train is clear of the main track, when green lights must be displayed to the front, side and rear, and except when a train is turned out against the current

of traffic, when green lights must be displayed to the front and side and to the rear, a green light toward the inside and a red light to the opposite side.

19 (A). By night freight trains will in addition display a light in cupola of the caboose, showing green to the front and red to the rear, except when a freight train is clear of the main track when green light must be displayed to the rear.

20. All sections except the last will display two green flags, and in addition, two green lights by night, in the places provided for that purpose on the front of the engine.

21. Extra trains will display two white flags and, in addition, two white lights by night, in the places provided for that purpose on the front of the engine.

22. When two or more engines are coupled, the leading engine

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only shall display the signals as prescribed by Rules 20 and 21, except that helping engines will duplicate signals of the engine they doublehead. Whistle signals will be sounded by the leading engine.

23. One flag or light displayed where in Rules 19, 20 and 21 two are prescribed will indicate the same as two; but the proper display of all train signals is required.

24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night.

25. Each car on a passenger train must be connected with the engine by a communicating signal appliance.

26. A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it; when thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workmen.

26 (A). A combination green and white flag by day and green and white light by night will be used at inspection stations by car repairers when engaged in work about passenger trains, testing air coupling hose, icing, watering and making such inspection as does not require them to go under or between cars. If such inspection necessitates their doing so, signals must be used as prescribed in Rule 26.

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Use of Signals.

27. A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a stop signal, and the fact reported to the Superintendent.

28. A combined green and white signal is to be used to stop a train only at the flag stations indicated on its schedule. When it

is necessary to stop a train at a point that is not a flag station on its schedule, a red signal must be used.

29. When a signal (except a fixed signal) is given to stop a train, it must, unless otherwise provided, be acknowledged as prescribed by Rule 14 (*g*) or (*h*).

30. The engine bell must be rung when an engine is about to move.

31. The engine bell must be rung on approaching every station, public road crossing at grade, tunnels and snow sheds, and until they are passed; and the whistle must be sounded at all whistling posts.

32. The unnecessary use of either the whistle or the bell is prohibited. They will be used only as prescribed by rule or law, or to prevent accident.

33. Watchmen stationed at public road and street crossings must use red signals only when necessary to stop trains.

22

Superiority of Trains.

71. A train is superior to another train by right, class or direction.

Right is conferred by train order; class and direction by time-table.

Right is superior to class or direction.

Direction is superior as between trains of the same class.

*D-71. A train is superior to another train by right or class.

*Right is conferred by train order, class by time-table.

*Right is superior to class.

72. Trains of the first class are superior to those of the second; trains of the second class are superior to those of the third; and so on.

Trains in the direction specified by the time-table are superior to trains of the same class in the opposite direction.

*D-72. Trains of the first class are superior to those of the second; trains of the second class are superior to those of the third; and so on.

73. Extra trains are inferior to regular trains.

Movement of Trains.

82. Time-table schedules, unless fulfilled, are in effect for twelve hours after their time at each station.

Regular trains twelve hours behind either their schedule arriving or leaving time at any station lose both right and schedule, and can thereafter proceed only as authorized by train order.

83. A train must not leave its initial station on any division (or subdivision), or a junction, or pass from double to single track, until

*[Paragraphs beginning with an asterisk in **bold-face** type in copy.]

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it has been ascertained whether all trains due, which are superior, or of the same class, have arrived or left.

83 (A). A train must not leave its initial station on any subdivision without a clearance card (Form No. 2643).

83 (B). Train registers will be provided at stations designated on the time-table. The information called for must be properly inscribed thereon by those acting in the capacity of conductor, unless relieved of such duty by rule or train order, in which case registering tickets may be accepted by operator, who will personally certify to the registering. Enginemen, before leaving register stations, except the initial point of their run, will require from the conductor a memorandum on prescribed form showing the numbers of all superior trains, and stating he has checked the register and that they have all arrived or departed, as the case may be.

*D-83. A train must not leave its initial station on any division (or subdivision), or a junction, until it has been ascertained whether all superior trains due have left.

84. A train must not start until the proper signal is given.

84 (A). On freight trains approaching sidings, conductors, if everything is all right, will signal enginemen to proceed. This will be answered by 14 (*g*).

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85. When a train of one schedule is on the time of another schedule of the same class in the same direction, it will proceed on its own schedule.

Trains of one schedule may pass trains of another schedule of the same class, and extras may pass and run ahead of extras.

*D-85. When a train of one schedule is on the time of another schedule of the same class it will proceed on its own schedule.

*Trains of one schedule may pass trains of another schedule of the same class.

*A section may pass and run ahead of another section of the same schedule, first exchanging orders, signals and numbers with the section to be passed.

*Extras may pass and run ahead of extras.

86. An inferior train must clear the time of a superior train, in the same direction, not less than ten minutes; but must be clear at the time a first class train, in the same direction, is due to leave the next station in the rear where time is shown.

*D-86. An inferior train must clear the time of a superior train not less than ten minutes; but must be clear at the time a first class train in the same direction is due to leave the next station in the rear where time is shown. Extra trains must clear the time of regular trains ten minutes unless otherwise provided.

87. An inferior train must keep out of the way of opposing superior trains and failing to clear the main track by the time required by rule must be protected as prescribed by Rule 99.

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*[Paragraphs beginning with an asterisk in bold-face type in copy.]

Extra trains must clear the time of regular trains five minutes unless otherwise provided, and will be governed by train orders with respect to opposing extra trains.

88. At meeting points between trains of the same class, the inferior train must clear the main track before the leaving time of the superior train.

At meeting points between extra trains, the train in the inferior time-table direction must take the siding unless otherwise provided.

Trains must pull into the siding when practicable; if necessary to back in, the train must first be protected as prescribed by Rule 99, unless otherwise provided.

25

89. At meeting points between trains of different classes the inferior train must take the siding and clear the superior train at least five minutes, and must pull into the siding when practicable. If necessary to back in, the train must first be protected as prescribed by Rule 99, unless otherwise provided.

90. Trains must stop at schedule meeting stations, if the train to be met is of the same class, unless the switch is right and the track clear.

When the expected train of the same class is not found at the schedule meeting station, the superior train must approach all sidings prepared to stop, until the expected train is met.

Trains must stop clear of the switch used by the train to be met in going on the siding.

91. Unless some form of block signals is used, trains in the same direction must keep at least ten minutes apart, except in closing up at stations.

91. (A). Trains must approach all stations where the view is obscured (not included in block signal limits—see Rule 302) at a rate of speed that will enable them to stop should an emergency arise.

Responsibility for collision rests with the following train, but this does not relieve the leading train from protecting itself.

*D-91. Unless some form of block signals is used, trains must keep at least ten minutes apart, except in closing up at stations.

92. A train must not arrive at a station in advance of its schedule arriving time.

A train must not leave a station in advance of its schedule leaving time.

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93. Within yard limits the main track may be used, protecting against first class trains.

*Second class and extra trains must move within yard limits prepared to stop, unless the main track is seen or known to be clear.

*D-93. Within yard limits the main tracks may be used, protecting against first class trains.

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*[Paragraphs beginning with an asterisk in **bold-face type** in copy.]

*Second class and extra trains must move within yard limits prepared to stop, unless main track is seen or known to be clear.

94. A train which overtakes another train so disabled that it cannot proceed will pass it, if practicable, and if necessary will assume the schedule and take the train orders of the disabled train, proceed to the next open telegraph office, and there report to the Superintendent. The disabled train will assume the right or schedule and take the train orders of the last train with which it has exchanged, and will, when able, proceed to and report from the next open telegraph office.

When a train, unable to proceed against the right or schedule of an opposing train, is overtaken between telegraph stations by an inferior train or a train of the same class having right or schedule which permits it to proceed, the delayed train may, after proper consultation with the following train, precede it to the next telegraph station, where it must report to the Superintendent. When opposing trains are met under these circumstances, it must be fully explained to them by the leading train that the expected train is following.

*D-94. A train which overtakes a superior train, so disabled that it cannot proceed will pass it, if practicable, and if necessary will assume the schedule and take the train orders of the disabled train, proceed to the next open telegraph office, and there report to the Superintendent. The disabled train will assume the schedule and take the train orders of the last train with which it has exchanged

and will, when able, proceed to and report from the next open telegraph office.

95. Two or more sections may be run on the same schedule.

Each section has equal time-table authority.

A train must not display signals for a following section without orders from the Superintendent.

*D-95. Two or more sections may be run on the same schedule.

*Each section has equal time-table authority.

*A train must not display signals for a following section, except as prescribed by rule D-85, without orders from the Superintendent.

96. When signals displayed for a section are taken down at any point before that section arrives, the conductor will, if there be no other provision, arrange in writing with the operator, or if there be no operator, with the switch tender, or in the absence of both, to the flagman left there for that purpose, to notify all opposing inferior train or trains of the same class leaving such point, that the section for which signals were displayed has not arrived.

97. Extra trains must not be run without orders from the Superintendent.

*D-97. Extra trains must not be run without orders from the Superintendent.

*Work extras must move with the current of traffic unless otherwise directed.

98. Trains must approach the end of double track, junctions,

railroad crossings at grade, and drawbridges, prepared to stop, unless the switches and signals are right and the track is clear. Where required by law, trains must stop.

99. In block signal districts where the automatic home block signal governing the track in use can be plainly seen at the rear of the train to be at "stop," its location being not less than one-half mile from the train to be protected, it will be unnecessary for the flagman to go back. The indication of the signal at the time train passes must not govern the modification of the flagging.

When a train stops or is delayed under circumstances in

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which it may be overtaken by another train the flagman must go back immediately with stop signals a sufficient distance to insure full protection. One-fourth of a mile from the rear of the train he will place one torpedo on the rail, continuing back one-half mile from the rear of his train, he will place two torpedoes on the rail, two rail lengths apart. He may then return to the single torpedo where he must remain until relieved by another flagman or is recalled by the whistle of his engine. When recalled if he does not see or hear an approaching train, the single torpedo will be removed (and not before), if conditions warrant, a red fusee will be displayed to protect his train while returning.

During foggy or stormy weather, in the vicinity of obscure curves or descending grades, or if other conditions require it, the flagman will increase the distance.

Should a train be seen or heard approaching before flagman has reached the required distance, he must, at once place on torpedo on the rail, and, if by night or during foggy or stormy weather, display a red fusee, continuing in the direction of the approaching train.

If the flagman is recalled before reaching the required distance he will, if necessary, place two torpedoes on the rail two rail lengths apart by day, and by night display a red fusee in addition, to protect his train while returning.

When a train is flagged, the engineman must obtain a thorough explanation of the cause, stopping if necessary.

The front of a train must be protected in the same manner when necessary.

Conductors are responsible for the full protection of their trains in both directions and under all conditions.

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100. When the flagman goes back to protect the rear of his train, the conductor must, in the case of passenger trains, and the next brakeman, or the conductor in the case of other trains, take the flagman's place on the train.

101. If a train should part while in motion, trainmen must, if possible, prevent damage to the detached portions. The signals prescribed by Rules 12 (*d*) and 14 (*f*) must be given.

The detached portion must not be moved or passed until the front portion comes back.

*D-101. If a train should part while in motion, trainmen must, if possible, prevent damage to the detached portions. The signals prescribed by rules 12 (d) and 14 (f) must be given.

*The detached portion must not be moved or passed until the front portion comes back.

*The engineman and trainmen of the frnot portion must give the train-parted signal to trains running on the opposite track. A train receiving this signal or being otherwise notified that a train on the opposite track has parted, must immediately reduce speed and proceed with caution until the separated train is passed.

*When a train is disabled so it may obstruct the opposite track, trains on that track must be stopped.

102. When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car.

103. Messages or orders respecting the movement of trains or the condition of track or bridges must be in writing.

104. Switches must be left in proper position after having been used. Conductors are responsible for the position of the switches used by them and their trainmen, except where switchtenders are stationed.

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A switch must not be left open for a following train unless in charge of a trainman of such train.

104 (A). All main line switches and those required by rule and special instructions to be locked must be left in that condition. If a lock is defective, the employe last using must supply one or report the absence to the superintendent.

104 (B). If a rigid split switch is run through it is thereafter unsafe and must be protected.

If an engine or car is run partially through a split switch, the entire movement must be continued; to reverse would result in derailment.

Split switches damaged in this way must be spiked unless the section foreman is on hand and takes charge. Such occurrences must be reported to the Superintendent by telegraph.

104 (C). Trainmen and other employes must not unlock main track switches nor stand within twenty feet of such switches until trains to be met or passed, or all of the trains for which switch was opened have cleared the entire switch. If practicable, they will take position on the opposite side of the track from switch stand while trains are passing.

Neither switch to a cross-over between main tracks must be unlocked during the passage of a train on either track.

104 (D). Enginemen must know that switches are properly set before they pull in or out of sidings or other tracks. When a train backs in on a siding to be met or passed by another train, the engine-

*[Paragraphs beginning with an asterisk in bold-face type in copy.]

man, when his engine is clear, must see that the switch is properly set for the main track. This does not relieve the trainmen from responsibility as to the proper position of the switch.

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104 (E). Flying switches will only be made when absolutely necessary, in which case train must be brought to a stop before movement is commenced.

105. Both conductors and enginemen are responsible for the safety of their trains and, under conditions not provided for by the rules, must take every precaution for their protection.

105. (A). Flagman go ahead when head right expires or trains are stopped at automatic block signals on single track.

106. In all cases of doubt or uncertainty the safe course must be taken and no risks run.

*D-151. Trains must keep to the right, unless otherwise provided.

*D-152. When a train crosses over to, or obstructs the other track, unless otherwise provided it must first be protected as prescribed by Rule 99 in both directions on that track.

*D-153. Trains must use caution in passing a train receiving or discharging passengers at a station, and must not pass between it and the platform at which the passengers are being received or discharged.

Rules for Movement by Train Orders.

201. For movements not provided for by time-table, train orders will be issued by authority and over the signature of the Superintendent. They must contain neither information nor instructions not essential to such movements.

They must be brief and clear; in the prescribed forms when applicable; and without erasure, alteration or interlineation.

202. Each train order must be given in the same words to all persons or trains addressed.

203. Train orders will be numbered consecutively each day, beginning with No. 1 at midnight.

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204. Train orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineman, and also to any one who acts as its pilot. A copy for each person addressed must be supplied by the operator.

Orders addressed to operators restricting the movement of trains must be respected by conductors and enginemen the same as if addressed to them.

205. Each train order must be written in full in a book provided for the purpose at the office of the Chief Dispatcher; and with it recorded the names of those who have signed for the order; the time and the signals which show when and from what offices the order was repeated and the responses transmitted; and the train dispatcher's

*[Paragraphs beginning with an asterisk in bold-face type in copy.]

initials. These records must be made at once, and never from memory or memoranda.

206. Regular trains will be designated in train orders by their numbers and engine numbers, as "No. 10 Eng. 1832" or "Second No. 10 Eng. 1833." Extra trains will be designated by engine numbers, and the direction as "Extra 798 'East' or 'West.'" Other numbers and time will be stated in words and figures.

207. To transmit a train order, the signal "31" or the signal "19" followed by the direction must be given to each office addressed, the number of copies being stated, if more or less than three—thus, "31 West copy 5," or "19 East copy 2."

208. A train order to be sent to two or more offices must be transmitted simultaneously to as many of them as practicable.

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The several addresses must be in the order of superiority of trains and when practicable must include the operator at the meeting or waiting point, each office taking its proper address.

When not sent simultaneously to all, the order must be sent first to the superior train.

Copies of the order addressed to the operator at the meeting or waiting point must be delivered to all trains affected until all have arrived from one direction.

*D-208. A train order to be sent to two or more offices must be transmitted simultaneously to as many of them as practicable. The several addresses must be in the order of superiority of trains, each office taking its proper address. When not sent simultaneously to all, the order must be sent first to the superior train.

209. Operators receiving train orders must write them in manifold during transmission and if they cannot at one writing make the requisite number of copies, must trace others from one of the copies first made, repeating same back to dispatcher and receiving his "O. K."

210. When a "31" train order has been transmitted, operators must (unless otherwise directed) repeat it at once from the manifold copy in the succession in which the several offices have been addressed, and then write the time of repetition on the order. Each operator receiving the order should observe whether the others repeat correctly.

Those to whom the order is addressed, except enginemen, must then sign it, and the operator will send their signatures preceded by the number of the order to the Superintendent. The response "complete," and the time, with the intitials of the Superintendent, will then be given by the train dispatcher, each operator receiving this response will then write on each copy the word "complete," the time, and his last name in full, and then deliver a copy to each person

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addressed, except enginemen. The copy for each engineman must be delivered to him personally by conductor.

211. When a "19" train order has been transmitted, operators

*[Paragraphs beginning with an asterisk in bold-face type in copy.]

must (unless otherwise directed) repeat it at once from the manifold copy, in the succession in which the several offices have been addressed. Each operator receiving the order should observe whether the others repeat correctly. When the order has been repeated correctly by an operator the response "complete," and the time, with the initials of the Superintendent, will be given by the train dispatcher. The operator receiving this response will then write on each copy the word "complete," the time, and his last name in full, and personally deliver a copy to each person addressed without taking his signature. But when delivery to engineman will take the operator from the immediate vicinity of his office, the engineman's copy will be delivered by conductor.

*Note.—A "19" train order must not be sent to a train, the superiority of which is thereby restricted.

212. A train order may, when so directed by the train dispatcher, be acknowledged without repeating, by the operator responding: "X (Number of Train Order) to (Train Number)," with the operator's initials and office signal. The operator must then write on the order his initials and the time.

213. "Complete" must not be given to a train order for delivery to an inferior train until the order has been repeated or the "X"

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response sent by the operator who receives the order for the superior train.

214. When a train order has been repeated or "X" response sent, and before "complete" has been given, the order must be treated as a holding order for the train addressed, but must not be otherwise acted on until "complete" has been given.

If the line fails before an office has repeated an order or has sent the "X" response, the order at that office is of no effect and must be there treated as if it had not been sent.

215. The operator who receives and delivers a train order must preserve the lowest copy.

216. For train orders delivered by the train dispatcher the requirements as to the record and delivery are the same as at other offices.

217. A train order to be delivered to a train at a point not a telegraph station, or at one at which the telegraph office is closed, must be addressed to

"C. and E.———(at———), care of ———,"

and forwarded and delivered by the conductor or other person in whose care it is addressed. When form 31 is used "complete" will be given upon the sginature of the person by whom the order is to be delivered, who must be supplied with copies for the conductor and engineman addressed, and a copy upon which he shall take their signatures. This copy he must deliver to the first operator accessible, who must preserve it, and at once transmit the signatures of the conductor and engineman to the train dispatcher.

*[Paragraphs beginning with an asterisk in bold-face type in copy.]

Orders so delivered must be acted on as if "complete" had been given in the usual way.

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For orders which are sent, in the manner herein provided, to a train, the superiority of which is thereby restricted, "complete" must not be given to an inferior train until the signatures of the conductor and engineman of the superior train have been sent to the Superintendent.

218. When a train is named in a train order by its schedule number alone, all sections of that schedule are included, and each must have copies delivered to it.

219. Unless otherwise directed, an operator must not repeat or give the "X" response to a train order for a train which has been cleared or of which the engine has passed his train order signal until he has obtained the signatures of the conductor and engineman to the order.

220. Train orders once in effect continue so until fulfilled, superseded or annulled. Any part of an order specifying a particular movement may be either superseded or annulled.

Orders held by or issued for or any part of an order relating to a regular train become void when such train loses both right and schedule as prescribed by Rules 4 and 82, or is annulled.

221. A fixed signal must be used at each train order office, which shall indicate "stop" when there is an operator on duty, except when changed to "proceed" to allow a train to pass for which there are no orders. A train must not pass the signal while "stop" is indicated. The signal must be returned to "stop" as soon as a train has passed. It must be fastened at "proceed" only when no operator is on duty.

Operators must have the proper appliances for hand signaling

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ready for immediate use if the fixed signal should fail to work properly. If a signal is not displayed at a night office, trains which have not been notified must stop and ascertain the cause, and report the facts to the Superintendent from the next open telegraph office.

Where the semaphore is used, the arm indicates "stop" when horizontal and "proceed" when in an inclined position.

221 and 221 (A). Trainmen and enginemen will be governed by the position of the train order signal at telegraph stations during all hours of the day and night. When any station train order signal is fastened at "proceed" position in both directions by day, and in addition the light shows "proceed" by night, it indicates that no operator is on duty, and the trainmen and enginemen will be governed accordingly.

221 (A). Clearance Card (Form 2643) will be issued to all trains stopped by train order signal, and will show numbers of orders, if any, for that train.

Enginemen in approaching a telegraph station, after whistling for station, if signal can be seen, will sound four short blasts of the whistle (14j) for "proceed" signal, and will acknowledge receipt of same by two short blasts of the whistle (14g), and proceed, unless

required to stop for other purposes. If "proceed" is not received, train must come to a stop and not proceed without a clearance card. If signal is at "proceed" when engineman comes in sight of it, he will not whistle for "proceed" but must stop and get a clearance.

Operators in changing position of the train order signal from "stop" to "proceed," should do so only when the movement can be seen by the engineman. If engineman fails to see the movement of arm or light, he must stop and not proceed until after receiving a clearance card. He must always instantly acknowledge the change in signal to "proceed" by two short blasts of the whistle (14g).

Unless some form of block signals is used operators must space trains ten minutes apart, using the train order signal for that pur-

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pose. They must show on clearance card time train will be allowed to depart.

Conductors and enginemen must respect time marked in clearance card and follow preceding train as per Rule 91.

222. Operators will promptly record and report to the train dispatcher the time of departure of all trains and the direction of extra trains. They will record the time of arrival of trains and report it when so directed.

222-A. Operators in relieving each other must make transfer of outstanding train orders, all overdue trains and undelivered messages on prescribed form (No. 2954).

223. The following signs and abbreviations may be used:

Initials for signature of the Superintendent.

Such office and other signals as are arranged by the Superintendent.

C & E—for Conductor and Engineman.

X—Train will be held until order is made "complete."

Com—for Complete.

O S—Train Report.

No—for Number.

Eng—for Engine.

Sec—for Section.

Psgr—for Passenger.

Frt—for Freight.

Mins—for Minutes.

Jct—for Junction.

Dispr—for Train Dispatcher.

Opr—for Operator.

31 or 19—to clear the line for Train Orders, and for Operators to ask for Train Orders.

S D—for "Stop Displayed."

The usual abbreviations for the names of the months and stations.

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Forms of Train Orders.

Form A. Fixing Meeting Points for Opposing Trains.

Examples.

(1.) No. 1 Eng. 1 meet No. 2 Eng. 2 at "B." No. 3 Eng. 3 meet Second No. 4 Eng. 5 at "B." No. 5 Eng. 6 meet Extra 95 east at "B." Extra 200 east meet Extra 201 west at "B."

(2.) No. 2 Eng. 7 and Second No. 4 Eng. 8 meet Nos. 1 Eng. 9 and 3 Eng. 10 at "C" and Extra 95 west at "D". No. 1 Eng. 9 meet No. 2 Eng. 2 at "B" Second No. 4 Eng. 5 at "C" and Extra 95 east at "D."

Trains receiving these orders will run with respect to each other to the designated points and there meet in the manner provided by the rules.

Form B. Directing a Train to Pass or Run Ahead of Another Train.

Examples.

(1.) No. 1 Eng. 1 pass No. 3 Eng. 3 at "K."

(2.) Extra 203 east run ahead of No. 6 Eng. 10 "M" to "B."

(3.) No. 1 Eng. 1 pass No. 3 Eng. 2 at "K" and run ahead of No. 7 Eng. 3 "M" to "Z."

When under (1) a train is to pass another both trains will run according to rule to the designated point and there arrange for the rear train to pass promptly.

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Under (2), the second-named train must not exceed the speed of the first-named train between the points designated.

When an inferior train receives an order to pass a superior train, right is conferred to run ahead of the train passed from the designated point.

Form C. Giving Right to a Train Over an Opposing Train.

Examples.

(1.) No. 1 Eng. 1 has right over No. 2 Eng. 2 "G" to "X."

(2.) Extra 37 east has right over No. 3 Eng. 3 "F" to "A."

This order gives right to the train first named over the other train between the points named.

If the trains meet at either of the designated points, the first named train must take the siding, unless the order otherwise prescribes.

Under (1), if the second-named train reaches the point last named before the other arrives, it may proceed, keeping clear of the opposing train as many minutes as such train was before required to clear it under the Rules.

Under (2), the regular train must not go beyond the point last named until the extra train has arrived, unless directed by train order to do so.

Form E. Time Orders.

Examples.

(1.) No. 1 Eng. 1 run twenty 20 mins. late "A" to "G."
(2.) No. 1 Eng 1 run twenty 20 mins late "A" to "G' and fifteen 15 mins. late "G" to "K," etc.

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(3.) No. 1 Eng. 1 wait at "H" until ten 10 a. m. for No. 2 Eng. 2.
(4.) Nos. 1 Eng 1 and 3 Eng. 3 wait at "N" until ten 10 a. m. "P" until ten thirty 10 30 a. m., "R" until ten fifty-five 10 55 a. m., etc.

(1) and (2) make the schedule time of the train named, between the stations mentioned, as much later as stated in the order, and any other train receiving the order is required to run with respect to this later time, as before required to run with respect to the regular schedule time. The time in the order should be such as can be easily added to the schedule time.

Under (3), the train first named must not pass the designated point before the time given, unless the other train has arrived. The train last named is required to run with respect to the time specified, at the designated point or any intermediate station where schedule time is earlier than the time specified in the order, as before required to run with respect to the schedule time of the train first named.

Under (4), the train (or trains) named must not pass the designated points before the times given.

Other trains receiving the order are required to run with respect to the time specified at the designated points or any intermediate station where schedule time is earlier than the time specified in the order as before required to run with respect to the schedule time of the train (or trains) named.

All of these examples may be used in connection with an extra train created by example (3) of Form G and the times at each point

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stated in that example have the same meaning as schedule times in the foregoing examples.

Form F. For Sections.

Examples.

(1.) Eng. 20 display signals and run as First No. 1 "A" to "Z."
(2.) Eng. 25 run as Second No. 1 "A" to "Z."
(3.) No. 1 Eng. 1 display signals "A" to "G" for Eng. 65. Second No. 1 Eng. 65 display signals "B" to "E" for Eng. 99.

These examples may be modified as follows:

(4.) Engs. 20 25 and 99 run as First Second and Third No. 1 "A" to "Z."

Example (1) is to be used when the number of the engine for which signals are displayed is unknown and is to be followed by example (2), both being single order examples.

Under example (2) the engine named will not display signals.

Under (3) and (4) the engine last named will not display signals.

For changing sections:

To add an intermediate section the following modification of example (1) will be used:

(5.) Eng. 85 display signals and run as Second No. 1 "N" to "Z." Following sections change numbers accordingly.

Under (5) Engine 85 will display signals and run as directed and following sections will take the next higher number.

To drop an intermediate section the following example will be used:

43

(6.) Eng. 85 is withdrawn as Second No. 1 at "H." Following sections change numbers accordingly.

Under (6) Engine 85 will drop out at "H" and following sections will take the next lower number.

To substitute one engine for another on a section, the following will be used:

(7.) Eng. 18 instead of Eng. 85 display signals and run as Second No. 1 "R" to "Z."

Under (7) Engine 85 will drop out at "R" and Engine 18 will run as directed.

If Engine 85 is last section the words "display signals and" will be omitted. Following sections need not be addressed.

To discontinue the display of signals the following example will be used:

(8.) Second No. 1 Eng. 85 take down signals at "D."

Under example (8) Second No. 1 will take down signals as directed and a following section must not proceed beyond the point named.

To pass one section by another, the following will be used:

(9.) Engs. 99 and 25 reverse positions as Second and Third No. 1 "H" to "Z."

Under (9) Engine 99 will run ahead of engine 25 "H" to "Z," and if necessary, both engines will arrange signals accordingly. Following sections, if any, need not be addressed.

The character of a train for which signals are displayed may be stated. Each section affected by the order must have copies, and must arrange signals accordingly.

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To annul a section for which signals have been displayed over a division or any part thereof, when no train is to follow the signals, Form K must be used.

Form G. Extra Trains.

Examples.

(1.) Eng. 99 run extra "A" to "F."
(2.) Eng. 99 run extra "A" to "F" and return to "C."
Under (2) the extra must go to "F" before returning to "C."
(3.) Eng. 77 run extra leaving "A" on Thursday Feb. 17th as follows with right over all trains:
Leave "A" eleven thirty 11 30 p. m.
" "C" twelve twenty-five 12 25 a. m.
" "E" one forty-seven 1 47 a. m.
Arrvie "F" two twenty-two 2 22 a. m.
This order may be varied by specifying the kind of extra and the particular trains over which the extra shall or shall not have right. Trains over which the extra is thus given right must clear the time of the extra five minutes.

Form H. Work Extra.

Examples.

(1.) Eng. 292 works seven 7 a. m. to six 6 p. m. between "D" and "E."
Under (1), the work extra must, whether standing or moving, protect itself against extras within the working limits in both directions as prescribed by rule. The time of regular trains must be cleared.

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This may be modified by adding:
(2.) Not protecting against (eastward) extras.
(3.) Not protecting against extras.
Under (2), the work extra will protect only against (westward) extras. The time of regular trains must be cleared.
Under (3), protection against extras is not required. The time of regular trains must be cleared.
When a work extra has been instructed by order to not protect against extra trains, and, afterwards, it is desired to have it clear the track for (or protect itself after a certain hour against) a designated extra, an order may be given in the following form:
(4.) Work Extra 292 clears (or protects against) Extra 76 east between "D" and "E" after two ten 2.10 p. m.
Under (4), extra 76 east must not enter the working limits before 2:10 p. m., and will then run expecting to find the work extra clear of the main track (or protecting itself) as the order may require.
To enable a work extra to work upon the time of a regular train, the following form will be used:
(5.) Work Extra 292 protects against No. 55 Eng. 202 (or..... class trains) between "D" and "E."
Under (5), the work extra may work upon the time of the train or trains mentioned in the order, and must protect itself against

such train or trains, as prescribed by Rule 99. The regular train or trains receiving the order will run expecting to find the work extra protecting itself.

When a work extra is to be given exclusive right over all trains the following form will be used:

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(6.) Work Extra 292 has right over all trains between "D" and "E" seven 7 p. m. to twelve 12 night.

This gives the work extra the exclusive right between the points designated between the times named.

Work extras must give way to all trains as promptly as practicable.

Whenever extra trains are run over working limits, they must be given a copy of the order sent to the work extra. Should the working order instruct a work extra to not protect against extra trains in one or both directions, extra trains must protect, as prescribed by Rule 99, against the work extra; if the order indicates that the work extra is protecting itself against trains they will run expecting to find the work extra protecting itself.

The working limits should be as the short as practicable; to be changed as the progress of the work may require.

Form J. Holding Order.

Examples.

Hold No. 2 Eng. 101.

Hold all (or.....ward) trains.

When a train has been so held it must not proceed until the order to hold is annulled, or an order given to the operator in the form:

".....may go."

These orders will be addressed to the operator and acknowledged in the usual manner, and will be delivered to conductors and enginemen of all trains affected.

Form J will only be used when necessary to hold trains until orders can be given, or in case of emergency.

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Form K. Annulling a Schedule or a Section.

Examples.

No. 1 Eng. 1 of Feb. 29th is annulled "A" to "Z."

Second No. 5 Eng. 5 of Feb. 29th is annulled "E" to "G."

The schedule or section annulled becomes void between the points named and cannot be restored.

Form L. Annulling an Order.

Example.

Order No. 10 is annulled.

If an order which is to be annulled has not been delivered to a train, the annulling order will be addressed to the operator, who will

destroy all copies of the order annulled but his own, and write on that:

Annulled by Order No. —.

An order which has been annulled must not be reissued under its original number.

Form M. Annulling Part of an Order.

Example.

That part of order No. 10 reading No. 1 Eng. 1 meet No. 2 Eng. 2 at "S" is annulled.

Form P. Superseding an Order or a Part of an Order.

Examples.

(1.) No. 1 Eng. 1 meet No. 2 Eng. 2 at "C" instead of "B."

(2.) No. 1 Eng. 1 has right over No. 2 Eng. 2 "G" to "R" instead of "X."

(3.) No. 1 Eng. 1 display signals for Eng. 85 "A" to "Z" instead of "G."

An order which has been superseded must not be reissued under its original number.

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Double Track Forms of Train Orders.

D-Form B. Directing a Train to Pass or Run Ahead of Another Train.

Examples.

(1.) No. 1 Eng. 1 pass No. 3 Eng. 2 at "K."

(2.) Extra 594 east run ahead of No. 6 Eng. 5 "M" to "B."

(3.) No. 1 Eng. 1 pass No. 3 Eng. 2 at "K" and run ahead of No. 7 Eng. 3 "M" to "Z."

When under (1) a train is to pass another both trains will run according to rule to the designated point and there arrange for the rear train to pass promptly.

Under (2), the second-named train must not exceed the speed of the first-named train between the points designated.

When an inferior train receives an order to pass a superior train, right is conferred to run ahead of the train passed from the designated point.

D-Form E. Time Orders.

Examples.

(1.) No. 1 Eng. 1 run twenty 20 mins. late "A" to "G."

(2.) No. 1 Eng. 1 run twenty 20 mins. late "A" to "G" and fifteen 15 mins. late "G" to "K," etc.

(3.) Nos. 1 Eng. 1 and 3 Eng. 3 wait at
"N" until ten 10 a. m.
"P" until ten thirty 10.30 a. m.
"R" until ten fifty-five 10.55 a. m., etc.
(1) and (2) make the schedule time of the train named, be

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tween the stations mentioned, as much later as stated in the order and any other train receiving the order is required to run with re spect to this later time, as before required to run with respect to th regular schedule time. The time in the order should be such a can be easily added to the schedule time.

Under (3), the train (or trains) named must not pass the desig nated points before the times given.

Other trains receiving the order are required to run with respec to the time specified at the designated points or any intermediat station where schedule time is earlier than the time specified in th order as before required to run with respect to the schedule tim of the train (or trains) named.

All of these examples may be used in connection with an extr train created by example (3) of Form G and the times at each poin stated in that example have the same meaning as schedule times i the foregoing examples.

D-Form F. For Sections.

Examples.

(1.) Eng. 20 display signals and run as First No. 1 "A" to "Z.
(2.) Eng. 25 run as Second No. 1 "A" to "Z."
(3.) No. 1 Eng. 20 display signals "A" to "G" for Eng. 6
Second No. 1 Eng. 65 display signals "B" to "E" for Eng. 99.
These examples may be modified as follows:
(4.) Engs. 20, 25 and 99 run as First, Second and Third No.
"A" to "Z."
Example (1) is to be used when the number of the engine fo

50

which signals are displayed is unknown and is to be followed b example (2), both being single order examples.

Under example (2) the engine named will not display signal

Under examples (3) and (4) the engine last named will no display signals.

For changing sections:

To add an intermediate section the following modification of ex ample (1) will be used:

(5.) Eng. 85 display signals and run as Second No. 1 "N" t "Z." Following sections change numbers accordingly.

Under (5), Engine 85 will display signals and run as directed an following sections will take the next higher number.

To drop an intermediate section the following example will b used:

(6.) Eng. 85 is withdrawn as Second No. 1 at "H." Following sections change numbers accordingly.

Under (6), Engine 85 will drop out at "H" and following sections will take the next lower number.

To substitute one engine for another on a section, the following will be used:

(7.) Eng. 18 instead of Eng. 85 display signals and run as Second No. 1 "R" to "Z."

Under (7), Engine 85 will drop out at "R" and Engine 18 will run as directed.

If Engine 85 is last section the words "display signals and" will be omitted. Following sections need not be addressed.

To discontinue the display of signals the following example will be used:

(8.) Second No. 1 Eng. 85 take down signals at "D."

51

Under example (8) Second No. 1 will take down signals as directed and a following section must not proceed beyond the point named.

The character of a train for which signals are displayed may be stated. Each section affected by the order must have copies, and must arrange signals accordingly.

To annul a section for which signals have been displayed over a division or any part thereof, when no train is to follow the signals, Form K must be used.

D-Form G. Extra Trains.

Examples.

(1.) Eng. 99 run extra "A" to "F."

(2.) Eng. 99 run extra "A" to "F" and return to "C."

Under (2) the extra must go to "F" before returning to "C."

(3.) Eng. 77 run extra leaving "A" on Thursday Feb. 17th as follows with right over all trains:

Leave "A" eleven thirty 11:30 p. m.
" "C" twelve twenty-five 12:25 a. m.
" "E" one forty-seven 1:47 a. m.
Arrive "F" two twenty-two 2:22 a. m.

This order may be varied by specifying the kind of extra and the particular trains over which the extra shall or shall not have right. Trains over which the extra is thus given right must clear the time of the extra ten minutes.

D-Form H. Work Extra.

Examples.

(1.) Eng. 292 works on eastward track (or both tracks) seven 7 a. m. to six 6 p. m. between "D" and "E."

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Under (1), the work extra must, whether standing or moving, protect itself within the working limits against extras moving with the current of traffic on the track or tracks named, as prescribed by Rule 99. The time of regular trains must be cleared.

This form may be modified by adding:

(2.) Not protecting against extras.

Under (2), protection against extra trains is not required. The time of regular trains must be cleared.

To enable a work extra to work upon the time of a regular train, the following may be used:

(3.) Work extra 292 protects against No. 55 Eng. 202 (or — class trains) between "D" and E."

Under (3), the work extra may work upon the time of the train (or trains) mentioned in the order and must protect against such train (or trains) as prescribed by Rule 99.

The regular train (or trains) receiving the order will run expecting to find the work extra protecting itself.

When it is desired to move a train against the current of traffic over the working limits, provison must be made for the protection of such movement.

When a work extra is to be given exclusive right over all trains, the following form will be used:

(4.) Work extra —— has right over all trains on —— track between —— and ——m to ——m.

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(4.) Work extra 275 has right over all trains on eastward and westward tracks between "G" and "H" seven 7 p. m. to twelve 12 night.

This gives the work extra the exclusive right to the track (or tracks) mentioned between the points designated between the times named.

Work extras must give way to all trains as promptly as practicable.

The working limits should be as short as practicable; to be changed as the progress of the work may require.

D-Form M. Annulling Part of an Order.

Example.

That part of Order No. 10 reading Extra 263 west pass No. 1 Eng. 1 at "S" is annulled.

D-Form P. Superseding an Order or a Part of an Order.

Examples.

(1.) No. 1 Eng. 1 pass. No. 3 Eng. 2 at "C" instead of "B."

(2.) No. 1 Eng. 1 display signals for Eng. 85 "A" to "Z" instead of "G."

An order which has been superseded must not be reissued under its original number.

D-Form R. Providing for a Movement Against the Current of Traffic.

Example.

(1.) No. 1 Eng. 1 has right over opposing trains on No. 2 (or eastward track "C" to "F."

A train must not be moved against the current of traffic until the track on which it is to run has been cleared of opposing trains.

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Under this order the designated train must use the track specified between the points named and has right over opposing trains on that track between those points. Opposing trains must not leave the point last named until the designated train arrives.

An inferior train between the points named moving with the current of traffic in the same direction as the designated train must receive a copy of the order, and may then proceed on its schedule, or right.

This order may be modified as follows:

(2.) After —— arrives at —— —— has right over opposing trains on —— track —— to ——

Example.

After No. 4 Eng. 5 arrives at "C" No. 1 Eng. 1 has right over opposing trains on No. 2 (or eastward track "C" to "F."

Under (2), the train to be moved against the current of traffic must not leave the first-named point until the arrival of the first-named train.

D-Form S. Providing for the Use of a Section of Double Track as Single Track.

Example.

No. 1 (or westward) track will be used as single track between "F" and "G."

Adding if desired: from one 1 p. m. to three 3 p. m.

Under this order all trains must use the track specified between the stations named and will be governed by rules for single track.

Trains running against the current of traffic on the track named must be clear of the track at the expiration of the time named, or protected as prescribed by Rule 99.

55

Telephone Instructions.

250. Where the telephone, instead of the telegraph, is used for the movements of trains, the rules and regulations governing the movement of trains by telegraph will be complied with, and in addition thereto, in every instance, the following will be observed:

251. In transmitting or repeating a train order by telephone, it must be spelled letter by letter, and where figures are used they must be duplicated, naming each figure separately; for example "f-i-f-t-y f-i-v-e" (followed by the words "five" "five"), "s-i-x-t-y f-i-v-e" (followed by the word "six" "five"), "o-n-e h-u-n-d-r-e-d a-n-d f-i-v-e" (followed by the words "One 0 "five"). Where two ciphers occur, as in 100, the duplication shall be "one double 0;" 1000 shall be "one triple 0."

252. To relay a 31 train order, the train dispatcher must transmit it to the relaying point, where it must be transmitted to destination. The receiver must repeat it to the relaying point, and each word must be underlined by the receiver at that point. It must then be repeated to the train dispatcher and, if correct, the train dispatcher will respond "O. K." After the parties addressed at the point of destination have signed the order, the signatures must be transmitted to the relaying office, and from there to the Superintendent, and "complete" will be given by the train dispatcher, as per Rule No. 210, and relayed to destination.

253. To relay a 19 train order, the train dispatcher must transmit it to the relaying point, where it must be transmitted to destination.

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The receiver must repeat it to the relaying point, and each word must be underlined by the receiver at that point. It must then be repeated to the train dispatcher and, if correct, "complete" will be given by the train dispatcher, as per Rule 211, and relayed to destination.

254. When a train order is to be copied by one of a train crew, the dispatcher must send the order separately to each train, and when repeated to the relaying office, the train and engine number must accompany it and be relayed to the train dispatcher.

255. A copy of every completed order must be filed at the point received, bearing the name of the person receiving and repeating the order.

256. All telephone booths are equipped with switch locks and, after being used, must be locked securely. Care must be taken to see that receiver is properly replaced on hook in order that circuit will not be interfered with.

Form 2643.

CLEARANCE CARD.

.....STATION.....190.....

Conductor and Engineer No.....

Orders for Your Train Are { Form "19" ..... / Form "31" .....

(If no orders form "19" or "31" endorse "NONE" in space provided for order numbers.)

SIGNAL IS OUT FOR.....

TIME,..... M..... OPR.

This does not interfere with or countermand any orders you may have received.
Conductors must sign orders form "31" before accepting from Operator.
Conductors and Enginemen must each have a copy and see that their train is correct designated in the above form, also see that the numbers of all train orders received correspond with numbers inserted above.

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Form 2529.

CHECK OF TRAIN REGISTER.

AT.....

CHECKED BY.....CONDUCTOR

TRAIN.....190.....

AT.....O'CLOCK.....M.

TRAIN	ARRIVED	DEPARTED	SIGNALS

Before leaving intermediate registry station conductor must enter on this blank all trains affecting his rights, and personally deliver to enginemen. Enginemen will not leave such stations without having this check and must know that no train affecting their rights is omitted therefrom.

FORM 31 FORM 31

Train Order No 10 March 27, *190*

To .....

.....

At ..... *Station.* | *X* (Initials) *Opr.*; 1:45 A. *M.*

.....

Conductor and Engineman must each have a copy of this order.

Repeated at ..... 2:20 A. *M.*

CONDUCTOR	TRAIN	MADE	AT	RECEIVED BY
Jones	45	Complete	2 20 A.M.	Black

(To be printed on white, manifold paper.)

Form 2565

FORM 31	SCHEDULE TRAIN ORDER	FORM 31

Train Order No. 10 March 27. 190

To .....

.....

At ..... *Station.* | *X* (Initials) *Opr.*; 1:45 A *M.*

.....

.....

.....

WESTBOUND Time to be in words and figures	A. M. or P. M.	STATIONS AND CALLS	EASTBOUND Time to be in words and figures	A. M. or P. M.

Conductor and Engineman must each have a copy of this order.

Repeated at 2:20 A *M.*

CONDUCTOR	TRAIN	MADE	AT	RECEIVED BY
Jones	45	Complete	2:20	Black

FORM 19 FORM 19

Train Order No 10 March 27, *190*

To .....

.....

At ..... *Station.* | *X* (Initials) *Opr.*; 1:45 A. *M.*

.....

Conductor and Engineman must each have a copy of this order.

Made Complete *Time* 2 16 P. *M.* Black *Opr.*

(To be printed on yellow, manifold paper.)

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Train Indicators.

A. A train so equipped must not leave its initial station without the indication properly displayed.

B. When the identity of a train is changed, the indicators must be changed to correspond. Before making such change, the safety of other trains must be fully considered.

C. Upon arrival at destination, the indicators must be removed.

D. The upper row must indicate the train, and the lower row the "only section," "last section" or "engine number."

E. (*a*) Common Standard—Single Row.

2 for Train No. 2.
1–2 for First No. 2.
X–162 for Extra 162.

(*b*) Parsons Indicator—Two Rows.

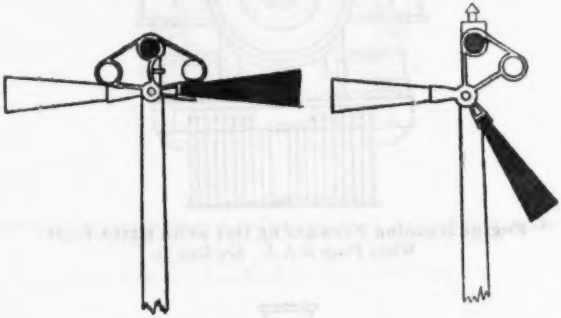
2 / O S — for Train No. 2, only section.

53 / 1st. — for Train No. 53, first section.

55 / L S — for Train No. 55, last section.

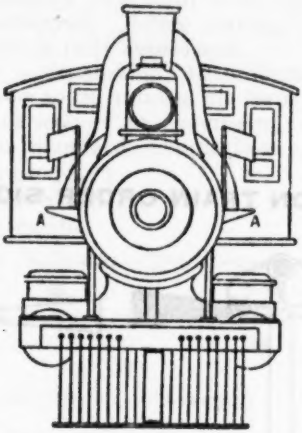
X / 1696 — for Train Extra 1696.

STATION TRAIN ORDER SIGNALS.

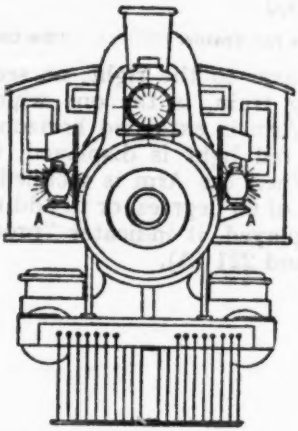


STOP—"Orders for Trains." "No Orders."

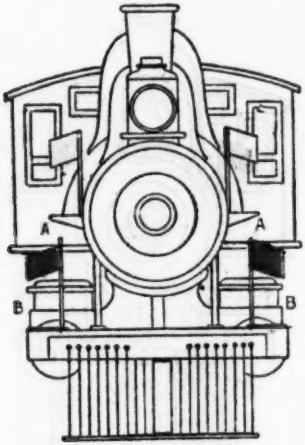
8. The arm to the right, as seen from an approaching train, is the one which governs. When the Arm is extended horizontally, or in addition a red light is displayed, it indicates "stop." When the Arm is inclined downward at an angle of 60 degrees, or in addition a green light is displayed, it indicates "proceed." See Rules 221 and 221 (A).



Engine Running Forward by Day as an Extra Train.
White Flags at A A. See Rule 21.

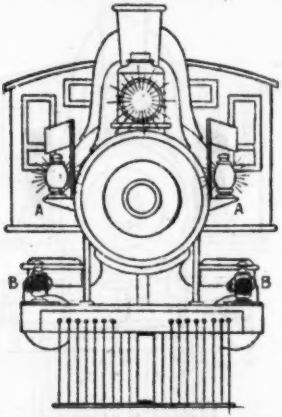


Engine Running Forward by Night as an Extra Train.
White Lights and White Flags at A A. See Rule 21.



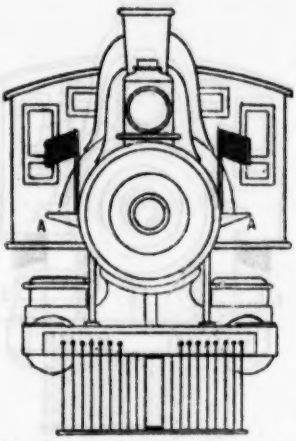
Engine Running Backward by Day as an Extra Train, without Cars or at the Rear of a Train Pushing Cars.

White Flags at A A. See Rule 21.
Green Flags at B B, as Markers. See Rules 19 and D-19.



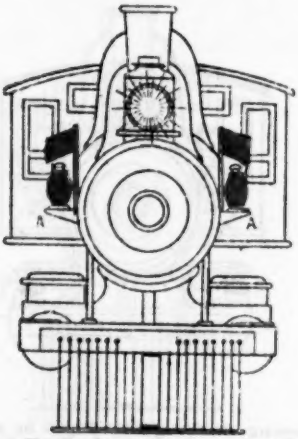
Engine Running Backward by Night as an Extra Train, without Cars or at the Rear of a Train Pushing Cars.

White Lights and White Flags at A A. See Rule 21.
Lights at B B, as Markers, showing Green at side and in direction Engine is moving and Red in opposite direction. See Rules 19 and D-19.



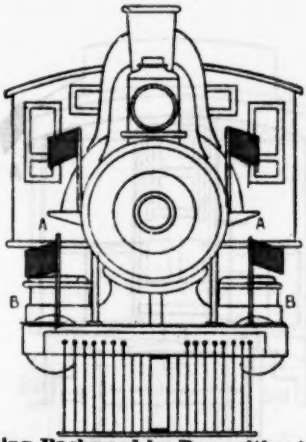
Engine Running Forward by Day Displaying Signals for a Following Section.

Green Flags at A A. See Rule 20.

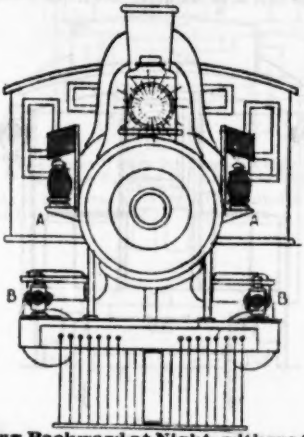


Engine Running Forward at Night Displaying Signals for a Following Section.

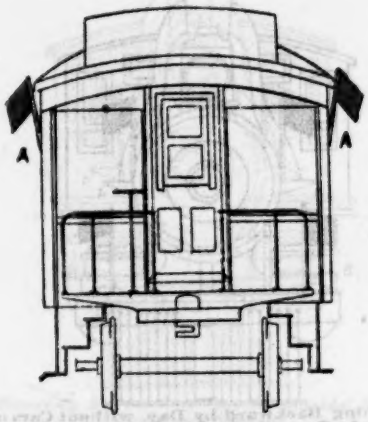
Green Lights and Green Flags at A A. See Rule 20.



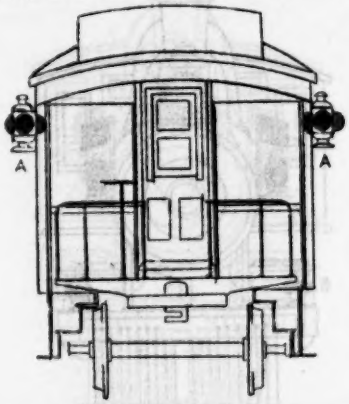
Engine Running Backward by Day, without Cars or at the Rear of a Train Pushing Cars, and Displaying Signals for a Following Section.
Green Flags at A A. See Rule 20.
Green Flags at B B, as Markers. See Rules 19 and D-19.



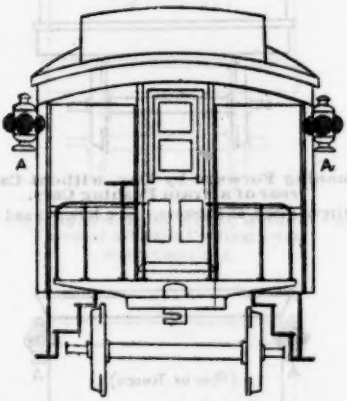
Engine Running Backward at Night, without Cars or at the Rear of a Train Pushing Cars, and Displaying Signals for a Following Section.
Green Lights and Green Flags at A A. See Rule 20.
Lights at B B, as Markers, showing Green at side and in direction engine is moving and Red in opposite direction. See Rules 19 and D-19.



Rear of Train by Day.
Green Flags at A A, as Markers. See Rules 19 and D-19

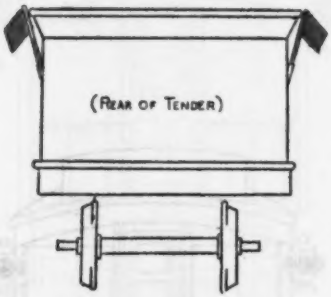


Rear of Passenger Train by Night while Running.
Lights at A A, as Markers, showing Green toward Engine and side and Red to rear. See Rules 19 and D-19.



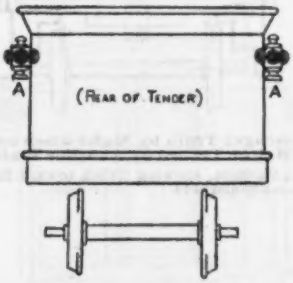
Rear of Passenger Train by Night when on Siding to be Met or Passed by Another Train.

Lights at A A, as Markers, showing Green toward Engine, side and to rear. See Rules 19 and D-19.



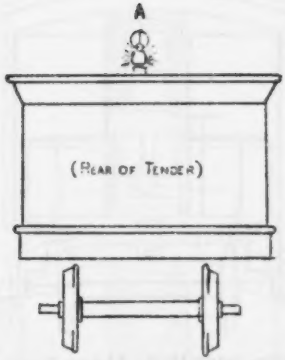
Engine Running Forward by Day, without Cars or at the rear of a Train Pushing Cars.

Green Flags, as Markers. See Rules 19 and D-19.

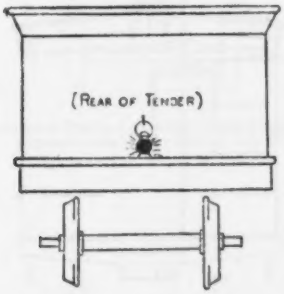


Engine Running Forward by Night, without Cars or at the rear of a Train Pushing Cars.

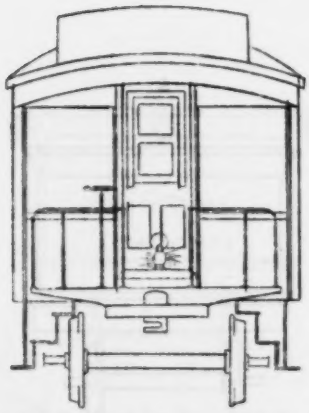
Lights at A A, as Markers, showing Green to the front and side and Red to the rear. See Rules 19 and D-19.



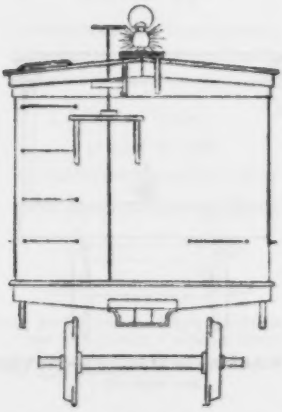
Engine Running Backward by Night, without Cars or at the front of a Train Pulling Cars.
White Light at A.



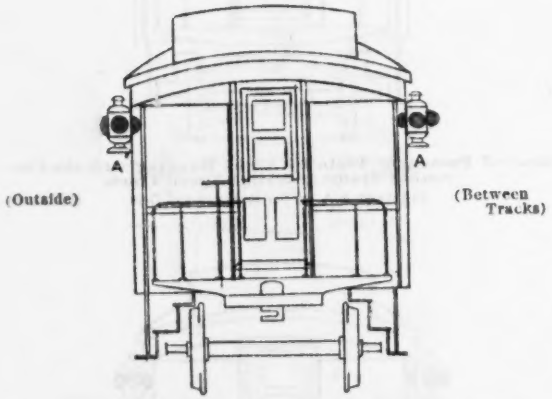
Locomotive Standing or Moving about Yard by Night.
See Rule 892.



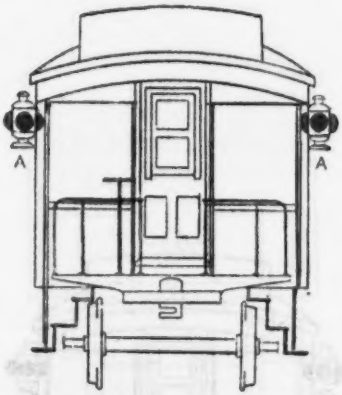
Passenger Cars being Pushed by an Engine by Night.
White Light on front of Leading Car. See Rule 24.



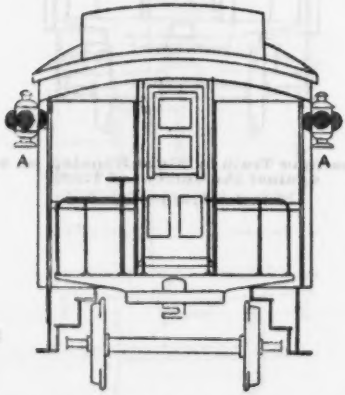
Freight Cars being Pushed by an Engine by Night.
White Light on front of Leading Car. See Rule 24.



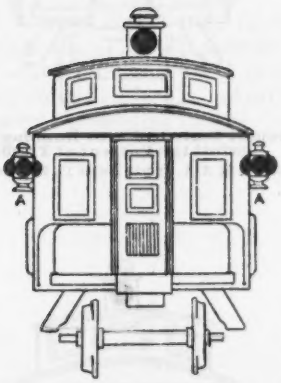
Rear of Passenger Train by Night Running on any Track against the Current of Traffic.
Lights at A A, as per Rule D-19.



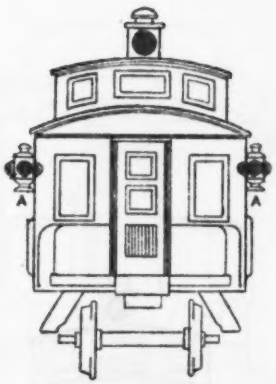
Rear of Passenger Train by Night Running with the Current of Traffic on a High Speed Track.
Lights at A A, as per Rules 19 and D-19.



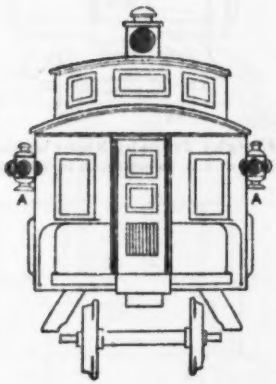
Rear of Passenger Train by Night Running with the Current of Traffic on a Slow Speed Track.
Lights at A A, as per Rules 19 and D-19.



Rear of Freight Train by Night while Running.
Lights at A A. as per Rules 19, D-19 and 19-A.



Rear of Freight Train by Night Running on any Track against the Current of Traffic.
Lights at A A, as per Rules 19, D-19 and 19-A.



Rear of Freight Train by Night when on Siding to be Met or Passed by Another Train.
Lights at A A, as per Rules 19, D-19 and 19-A.

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General Description of Signals Used in Connection with Controlled Manual Block (Train Staff System), Automatic Block System and Interlocking Switch and Signal Plants, and Rules and Instructions Governing the Movement of Trains Controlled by Such Signals.

Block Signaling.

Definitions.

Block.—A length of track of defined limits, the use of which by trains is controlled by block signals.

Block Station.—A place from which block signals are operated.

Block Signal.—A fixed signal controlling the use of a block.

Home Block Signal.—A fixed signal at the entrance of a block to control trains in entering and using said block.

Distant Block Signal.—A fixed signal used in connection with a home block signal to regulate the approach thereto.

Advance Block Signal.—A fixed signal used in connection with a home block signal to sub-divide the block in advance.

Block System.—A series of consecutive blocks.

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Controlled Manual Block System.—(Train Staff System.) A block system in which the signals are operated manually, and so constructed as to require the co-operation of the signalmen at both ends of the block to display a clear signal.

Automatic Block System.—A block system in which the signals are operated by electric, pneumatic or other agency actuated by a train, or by certain conditions affecting the use of a block.

Interlocking.

Definitions.

Interlocking.—An arrangement of switch, lock and signal appliances so interconnected that their movements must succeed each other in a predetermined order.

Interlocking Plant.—An assemblage of switch, lock and signal appliances, interlocked.

Interlocking Station.—A place from which an interlocking plant is operated.

Interlocking Signals.—The fixed signals of an interlocking plant.

Home Signal.—A fixed signal at the point at which trains are required to stop when the route is not clear.

Distance Signal.—A fixed signal used in connection with a home signal to regulate the approach thereto.

Dwarf Signal.—A low fixed signal.

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General Description of Signals.

1. See Figs. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

2. Fixed signals, as a rule, will be of two prescribed forms; the Semaphore which consists of a post with an arm projecting outward to the right as viewed from an approaching train; and the Disc type of signal which displays a disc in a banjo-shaped case mounted on a post.

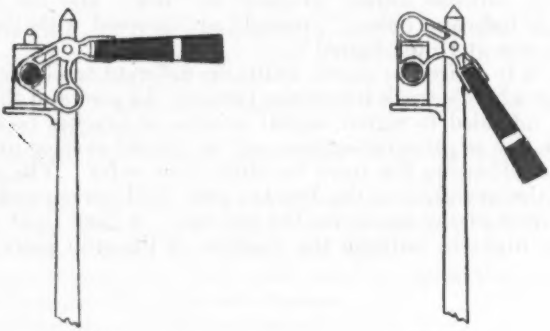
3. Indications for day time are given by two positions, and in addition during darkness, by three lights of prescribed color.

4. Fixed signals may be regarded as of two kinds; the Home Signal which indicates either "proceed" or "stop," and the Distant Signal which indicates either "proceed" or "proceed with the train prepared to stop at Home Signal."

5. When it is desired to signal trains on different tracks from the same post, or where a track intervenes between the post and the track which it is intended to signal, signal bridges or bracket posts shall be used. So far as practicable, they will be placed over or upon the right of and adjoining the track to which they refer. The relative position of the uprights on the bracket post shall correspond to the relative position of the tracks on the ground. A blue light will be displayed at night to indicate the position of the stub posts or uprights.

GENERAL MEANING OF SIGNALS.

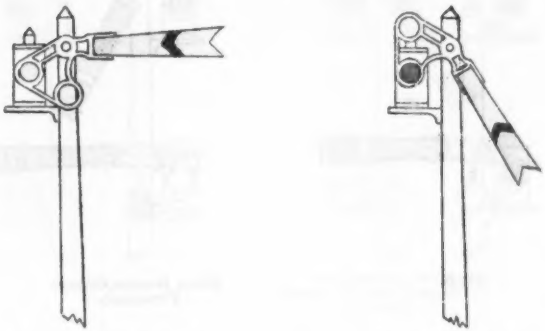
Fig. 1. Home Semaphore Signal.



Stop. Proceed.

1. When the Arm is extended horizontally, or in addition a red light is displayed, it indicates "stop." When the Arm is inclined downward at an angle of 60 degrees, or in addition a green light is displayed, it indicates "proceed."

Fig. 2. Distant Semaphore Signal.

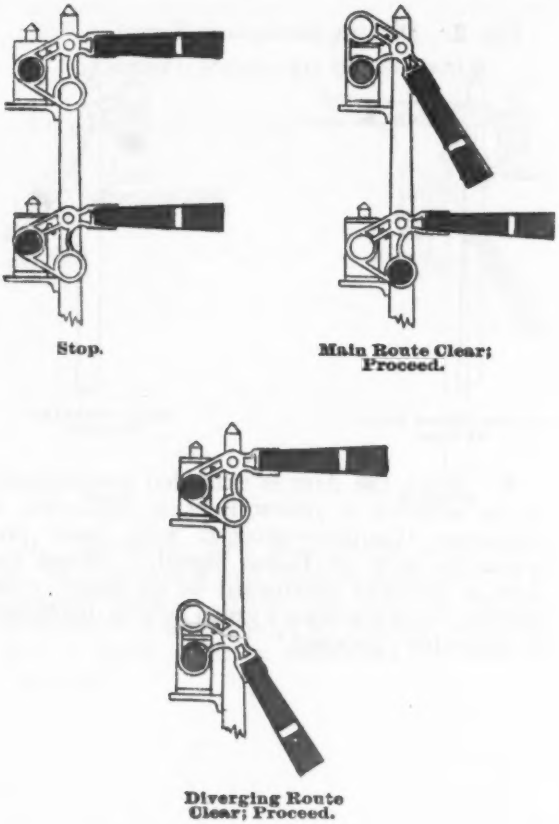


Caution—Home Signal at Stop.

Home Signal at Proceed.

2. When the Arm is extended horizontally, or in addition a yellow light is displayed, it indicates "Caution—proceed with train prepared to stop at Home Signal." When the Arm is inclined downward at an angle of 60 degrees, or in addition a green light is displayed, it indicates "proceed."

Fig. 3. Two Arm Home Semaphore Signal.



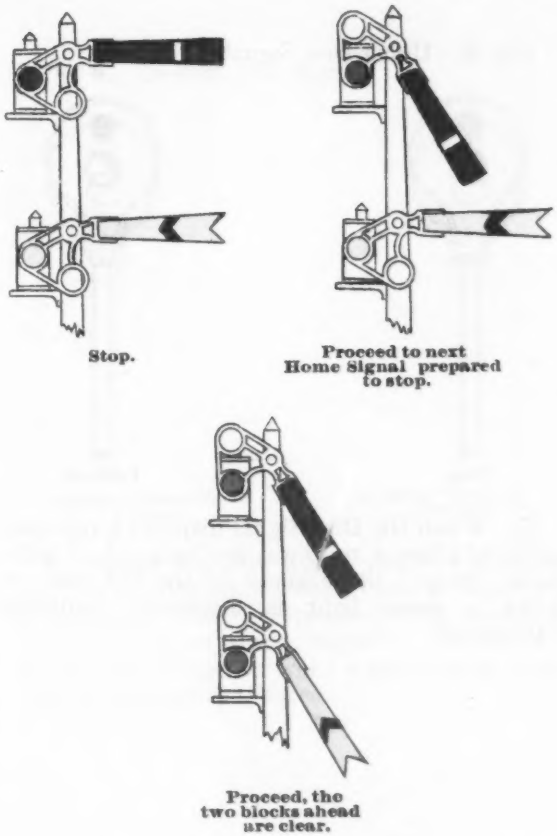
Stop.

Main Route Clear; Proceed.

Diverging Route Clear; Proceed.

3. When more than one Home Signal is on one post or mast, the upper Arm will govern the main or superior route, and the lower Arm the inferior or diverging routes.

Fig. 4. Home and Distant Semaphore Signal.



4. When a Home and Distant Signal are on one post or mast, the Home Signal controls the block ahead; the Distant Signal indicates the position of the next Home Signal.

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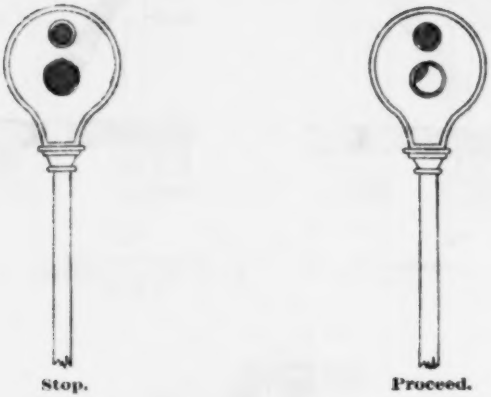
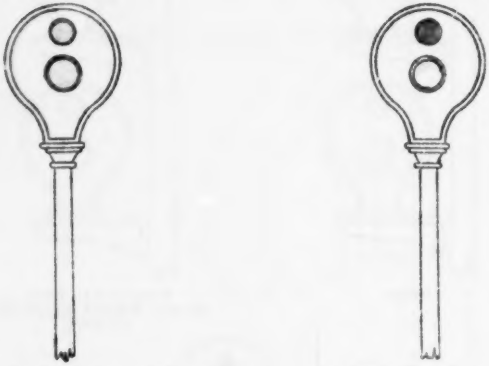
Fig. 5. Home Disc Signal.



5. When the Disc Signal displays a red disc, or in addition a red light is displayed, it indicates "Stop;" the absence of the red disc, or when a green light is displayed, indicates "Proceed."

Fig. 6. Distant Disc Signal

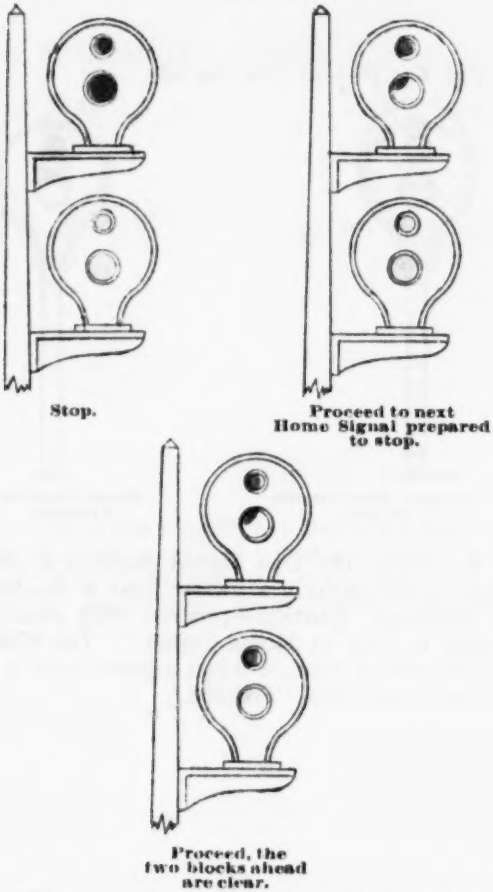


Caution—Home Signal at Stop.

Home Signal at Proceed.

6. When the Disc Signal displays a yellow disc, or in addition a yellow light is displayed, it indicates "Caution—proceed with train prepared to stop at Home Signal." The absence of the yellow disc, or when a green light is displayed, indicates "Proceed."

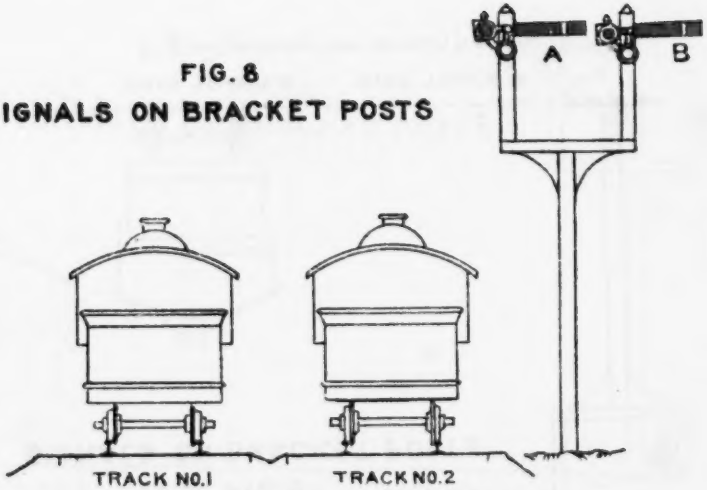
Fig. 7 Home and Distant Disc Signal.



7. When a Home and Distant Signal are on one post or mast, the Home Signal controls the block ahead; the Distant Signal indicates the position of the next Home Signal.

FIG. 8

SIGNALS ON BRACKET POSTS



Signal A governs train on track No 1

" B " " " " " 2

FIG. 9
SIGNALS ON BRACKET POSTS

FIG. 10
SIGNALS ON BRACKET POSTS

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General Block Signal Rules.

301. Home and Distant Signals apply only to trains running in the proper direction.

302. Enginemen finding a Distant Signal at "caution" must immediately bring their trains under control, and be prepared to stop before reaching the Home Signal. They are reminded that although the Distant Signal indicates the position of the Home Signal, the Home Signal may assume the Stop position after the Distant Signal has given the Clear indication, and while the train is between the Distant and Home Signal. For this reason enginemen and trainmen must be on the alert, prepared to bring the train to a stop if the Home Signal indicates Stop, and be governed by Rule 504.

303. Distant Semaphore and Disc Signals are also used for indicating the position of facing point switches.

304. In foggy or stormy weather enginemen must approach both Distant and Home Signals with great care, and have their train under control.

305. Firemen as well as enginemen must watch signals closely, as frequently the first view can be had from the fireman's side.

306. Arms will not be put on Semaphore Signals nor Disc exposed in Disc Signals until they are in service. After being so placed they must be regarded as in service whether bulletin has been issued or not.

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Controlled Manual Block System (Train Staff System).

Description and Method of Operation.

*1. All rules relating to the protection of trains are in force, and are only modified by the general instructions herein.

2. Special instructions and rules on the time-table will govern the movement of trains in the observance of Semaphore or Disc Signals where the staff block system is in operation.

3. The work of the staff block system is effected by the erection in the block offices at each end of the block, of staff block instruments which are in charge of the signalmen on duty. The two instruments are electrically connected, and one cannot be operated without the knowledge and co-operation of the signalman in charge of the other.

4. When one staff has been withdrawn from an instrument, another staff cannot be withdrawn from either until the staff already withdrawn is replaced in the same instrument, or the one at the other end of the block.

5. The absolute staff system permits but one staff to be withdrawn from any pair of instruments at the same time. In case a staff should be lost, the instruments controlling that block are inoperative. Under such circumstances, all concerned will be governed by Rule 43.

DARK PAGE

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Rules.

Signalmen.

411. The normal indication of Home Block Signals is "Stop."
412. Signals must be operated carefully and with a uniform movement. If a signal fails to work properly, its operation must be discontinued and the signal secured so as to give the normal indication until repaired.
413. Signalmen must observe, as far as practicable, whether the indication of the signals corresponds with the position of the levers.
414. Signalmen must not make nor permit any unauthorized alterations or additions to the apparatus.
415. If any electrical or mechanical appliance fails to work properly the Superintendent and Signal Supervisor must be notified, and only duly authorized persons permitted to make repairs.
416. A block record must be kept at each block station.
417. Block signal instruments and bells must be used only by signalmen and as directed by the rules.
418. Bells must not be used for any purpose other than to give the prescribed signals.
419. Bell signals must be given deliberately and distinctly, and answered promptly. All signals must be repeated until answered.
420. At offices where block signal instruments are used the following bell signal code will be observed:

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1: (Long stroke). Answer telegraph or telephone call.
2: All right. Yes.
3: Block wanted. Or unlock my lever. Answer by unlocking or by 5, or 3-1.
4: Train has entered block.
5: Block is not clear.
6: Has a train entered this block? Answer by 2, or 2-1.
1-2: Clear. Train has cleared block.
2-1: No.
2-2-2: Previous signal given in error. Answer by 2.
2-4: Has train cleared block? Answer by 5, or 3-1.
3-1: Have unlocked. Block is clear. (It must not be used unless the block is known to be clear).
3-3: Train in block will take intermediate siding. Answer by repeating.
1-2-3: Train has gone on siding or crossed over to opposite track. Main track is clear and switches closed. Answer by repeating.
5-5-5: Obstruction in block. Stop all trains approaching this station. Answer by repeating.
6-6-6: Testing. Answer by repeating.
421. To receive and forward a train from A to B, the block being clear, the manipulation of the instruments is as follows:

BLEED THRU

The signalman at A will press bell key (A, Fig. 1) three times, which rings bell at B. The signalman at B will unlock A by pressing his bell key, and holding it closed, thereby deflecting the "current indicating needle" (F, Fig. 2) at A to the right. This informs A that B has furnished A current, and he will proceed to remove the staff by turning the preliminary spindle handle (B, Fig 1) to the

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right as far as it will go, and then permit it to automatically return to its normal position. This unlocks the instrument, and indicates the fact by displaying a white instead of a red disc in the indicator at A (H, Fig. 2).

The signalman will now move the end staff (E, Fig. 1) up the vertical slot into engagement with the outer guard (N, Fig. 2) it having first been turned to the right position, revolve the latter through one-third of a turn, using the staff as a handle, and finally withdraw the staff through the opening (M, Figs. 1 and 3).

In making the one-third of a turn, the "staff indicating needle" (G. Fig. 3) at A moved from "Staff In" to "Staff Out." Immediately on withdrawing the staff, the signalman at A once more will press his bell key (A, Fig. 1) which indicates to the signalman at B, by moving his needle from "Staff In" to "Staff Out," that the operation is completed.

When a staff has been withdrawn from the instrument, it may be delivered to the train about to enter the block as hereinafter instructed. On arrival of the train at B, the staff will be delivered to the signalman in charge, who will, after seeing the markers, place the staff in the opening (M, Figs. 1 and 3) of instrument, having first turned the outer guard (N, Fig. 2) to place, move the staff into engagement with and revolve latter through one-third of a turn, using the staff as a handle, and allow staff to roll down the spiral. He will then press his bell key twice, thus notifying A that the train is out of the block, which operation also moves the "staff indicating needle" at A from "Staff Out" to "Staff In."

The signalman at A will press his bell key twice in acknowledg-

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ment, and by so doing moves the "staff indicating needle" at B from "Staff Out" to "Staff In."

The instruments are now synchronized, and another staff can be obtained from either in the manner above outlined.

422. Block signals must be restored to the normal indication as soon as the train for which they were cleared has passed 300 feet.

423. Unless otherwise provided, signalmen must not give "3" until they have received "4" from the next block station in the rear nor unlock the next block station in the rear before receiving "3."

424. Signalmen must observe all passing trains and note whether they are intact and the markers properly displayed. Should there be any indication of conditions endangering the train, or a train on another track, he must notify the signalman at the next block in advance. A signalman having received this notice must display Stop

signal in both directions. Should a train going in the opposite direction be stopped it may be permitted to proceed when it is known that the track on which it is running is not obstructed.

425. Should a train pass a block station without markers, the signalman must notify the next block station in each direction, and must not report that train clear of the block until he has ascertained that the train is complete.

429. When a train takes a siding the signalman must know that it is clear of the block before giving "1-2" or displaying a Clear-signal for that block.

A signalman, after having unlocked the next block station in the

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rear or given "3-1," must not permit train or switching movements that will endanger an approaching train.

431. When, as provided for in Rule 464, coupled trains have been separated, the signalman must regard each portion as an independent train.

434. In case of failure of staff apparatus, all concerned must be notified, and trains will be moved by train orders until it has been repaired. In such event, the train order takes the place of the staff through only one block on each train order, and this order must be given jointly to the conductor and engineman of the train and the signalmen at both ends of the block. When a staff apparatus has been repaired, it will not be put into use until authorized by Superintendent. Before issuing train orders, substituting staff system, the train dispatcher must ascertain that block is clear.

437. Signalmen must have the proper appliances for hand signaling ready for immediate use. Hand signals must not be used when the proper indication can be displayed by the fixed signals. When hand signals are necessary they must be given from such a point and in such a way that there can be no misunderstanding on the part of enginemen or trainmen as to the signals, or as to the train for which they are given.

438. Signalmen will be held responsible for the care of the block station, lamps, and supplies; and of the signal apparatus, unless provided for otherwise.

439. Lights in block stations must be so placed that they cannot be seen from approaching trains.

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440. Lights must be used upon all block signals from sunset to sunrise and whenever the signal indications cannot be clearly seen without them.

441. If a train over-runs a Stop-signal, the fact, with the number of train, must be reported to the Superintendent.

442. If a Stop-signal is disregarded, the fact, with the number of train, must be reported to the block station in advance and then to the Superintendent.

443. Unless otherwise directed by train order, signalmen may at any time "staff" a train when the block in advance is clear and it is

apparent that no opposing train will thereby be delayed at the nex station. When an opposing train of the same grade of importanc will be delayed not exceeding five minutes, signalmen may also "staff trains without question, but passenger trains must not be delayed b freight trains without the authority of the train dispatcher. Whe in doubt, signalmen at telegraph stations will call train dispatche and say "3," signing his office signal, which will mean:

"Which train shall I 'staff?'"

The dispatcher will reply (for example):

"'Staff' No. 218."

444. Signalmen will remain in view until the rear of a train ha passed and will give a "proceed" signal to the conductor or brake man on rear of train to indicate that a staff has been delivered t engineman.

445. Signalmen, unless otherwise instructed by train dispatcher will "staff" the train of superior time-table right, and sidetrack th inferior train when a meeting point develops at their station.

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Enginemen and Trainmen.

450. A train will not pass into a block until it has a staff in i possession and the signals indicate "proceed".

451. The possession of a staff is authority for the train to proce regardless of opposing trains, provided the station train order signa is at clear.

452. The delivery of the staff to the engineman will be either b staff crane, hand of block signalman, or the conductor or head brake man of his own train, and the engineman must not accept deliver of a staff from any other person. Signalmen will not deliver sta to any other than one of these employes.

453. The staff will be delivered by engineman on arriving at sta station at designated spot, or, in case of taking siding and it canno be personally delivered by engineman, it will be sent to signalma by head brakeman or conductor. Under no circumstances must staff be transferred from one train to another. It must invariabl be delivered to the signalman and placed in the machine before de livered to another train. It will be the duty of the signalman to se that all of the train clears the block before he inserts staff in the in strument.

454. When a staff has been secured by the engineman, he wi announce the fact by sounding one short, one long, and one shor blast of the whistle (0 — 0). See Rule 444.

455. When two or more engines are coupled, the engineman of th leading engine will handle the staff; but the engineman of the othe engine, or engines, must know that he has the staff before proceedin

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456. In case a train parts or it is necessary to "double," th staff must be retained by the engineman until all the train is clea

of the block. A pushing engine will be considered as the rear end of a train and must run the entire length of the block.

457. Conductors and enginemen, before entering staff limits, will obtain a train order, designating their train by number, section or extra for identification.

458. A work train, after obtaining train orders authorizing its existence, may occupy a block upon the delivery of staff, until same is surrendered at block station at either end of the block before the expiration of the time specified in its orders, unless otherwise instructed.

459. In case of unexpected delay to a train to which a staff has been delivered, same can be recalled by signalman, and on return of staff to the instrument this will cancel the authority given to such train to proceed.

464. Unless directed by special instructions, when two or more trains have been coupled and so run past any block station, they must be uncoupled only at a block station and the signalman notified.

465. When a train takes a siding it must not again enter the block without permission of the signalman.

466. When it is necessary for a train to cross over, the conductor, before crossing or returning, must notify the signalman and obtain permission to do so.

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467. Enginemen and trainmen must not accept "proceed" hand signals as against block signals.

468. The engineman of a train which has parted must sound the whistle signal for "Train-parted" on approaching a block station.

469. An engineman receiving a "Train-parted" signal from a signalman must answer by the whistle signal for "Train-parted."

470. When a parted train has been recoupled the signalman must be notified.

472. If the track is obstructed between block stations, notice must be given to the nearest block signalman.

473. If a train is held by a block signal to exceed five minutes, the conductor must ascertain the cause.

474. Conductors must report to the Superintendent any unusual detention at block stations.

Automatic Block System.

1. Track circuits are used to control automatic and semi-automatic block signals, and include all turn-outs up to the fouling points.

2. Switches in main tracks and switches of cross-overs to main tracks set signals to "stop" when moved from their normal positions.

3. When an indicator (small signal) is placed opposite or near a main line switch, it is so controlled that when there is a train or an open switch within the block in which the switch in question is located, it will indicate "stop."

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4. The signal connections aand operating mechanisms are so arranged that a Home Block Signal shall indicate "stop," and a Distant Block Signal "caution" after any part of a train shall have passed it.

5. High speed interlocking signals coming within the block signal limits may be made a part of the Block Signal System, and when so arranged they will be semi-automatic.

6. All automatic block signals will be designated by numbers indicating approximately the distance in miles and tenths according to mile posts. Signals governing east-bound trains to have even numbers and signals governing west-bound trains odd numbers.

Rules.

501. The normal indication of Distant and Home Block Signals is "Proceed."

502. Block signals control the use of the blocks, but, unless otherwise provided, do not effect the movements of trains under the time table or train rules; nor dispense with the use or the observance of other signals whenever they may be required.

504. When a train is stopped by a block signal, it may proceed when the signal is cleared. On single track, send a flagman in advance immediately; wait the full time indicated by special rules on the time-table after the flagman has started; and then proceed under control to the next clear signal, or, if the signal next in advance is in plain view and the track ahead is seen to be clear, proceed under control not exceeding six miles per hour. On double track

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a train may proceed after waiting one minute, running under control.

505. When a number plate is reversed showing yellow, or signal blade is removed, it will indicate that the signal is out of service and, unless otherwise directed, trains will proceed with caution to the next signal.

506. When a train is stopped by a signal, the conductor must report the fact on From 3104.

508. An engineman of a train entering a block as provided for by these rules, will be held responsible in case of accident caused by overtaking the preceding train.

509. Trainmen must be careful to set trains or cars on siding beyond the wooden insulated joints which are placed in the track at the fouling points; otherwise if set upon or over the fouling point toward the main track, the signal protecting the block will remain at "stop" and cause detention to trains.

510. Trains on sidings or diverging routes desiring to come out on the main track must be governed by signals at sidings or signal controlling movement of trains from branch or spur. If signal is at danger, switch can be used only under protection of flagman.

511. A train on double track before crossing over from one track

to another, must be governed by the indicator at the switch of the cross over in the track upon which the train stands. If the indicator shows "proceed," the train may cross over. If, however, the indicator displays "stop," the train may cross over only under protection of a flagman.

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512. When it is desired to move a train through a cross-over from one track to another, the switch in the track the train is occupying must be thrown first.

513. Both switches of a cross-over between two main tracks, or between a main track and a side track, must not be closed while a train, an engine or a car occupies the connection between the switches of such cross-over.

514. After a movement is made through a cross-over, both switches must immediately be thrown to their normal position.

515. Switch engines and extra trains, unless otherwise provided, must clear the block at least five minutes in advance of regular schedule trains.

516. After using switch, brakeman must see that the point rail is closed against the stock rail.

517. If necessary to clean the ash-pan or cinders from the smoke arch on the main track inside of block signal limits, the ashes and cinders must immediately be removed by fireman if no one else is available for the purpose.

Interlocking Signals.

Requisites of Installation.

1. The apparatus so constructed that the failure of any part directly controlling a signal will cause it to give the normal indication.

2. The normal indication of Home Signals—"Stop," Distant Signals — "Caution."

3. The interlocking of signals with switches, locks, railroad cross-

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ings, or drawbridges, so that a "proceed" signal cannot be given unless the route to be used is clear and stop signals displayed for all conflicting routes.

4. The apparatus so constructed that the failure of any part directly controlling a switch or lock will prevent the display of the "proceed" signal.

5. The established order of interlocking such that:

A "proceed" signal cannot be displayed until derails or diverging switches, if any, in conflicting routes are in their normal position and the switches for the required route set and locked.

The display of a clear Home Signal shall lock all switches and locks in the route as far as the point to which such signal gives permission to proceed, locking all opposing or conflicting signals

and releasing the corresponding Distant Signal, where such signa
is used.

Where Distant Signals are used, the display of a "proceed" Di
tant Signal shall lock the Home Signal in the "proceed" position

Rules.

602. Interlocking signals, unless otherwise provided, do not a
fect the movements of trains under the time-table or train rules; n
dispense with the use or the observance of other signals whenev
they may be required.

Signalmen.

611. The normal indication of Home Signal is "Stop."

612. Levers, or other operating appliances, must be used onl
by those charged with the duty and as directed by the rules.

613. Signal levers must be kept in the position giving the nor
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indication, except when signals are to be cleared for an immedia
train or engine movement.

614. When the route is clear the signals must be cleared su
ficiently in advance of approaching trains to avoid delay.

615. Signals must be restored so as to give the normal indicatio
as soon as the train for which they were cleared has passed the hom
signal limits of the interlocking plant, except that where electri
locking is in use, signals will be restored to normal indication a
soon as rear end of train has passed them.

616. If necessary to change any route for which the signals hav
been cleared for an approaching train or engine, switches mus
not be changed or signals cleared for any conflicting route unti
the train or engine, for which the signals were first cleared, ha
stopped.

617. A switch or facing point lock must not be moved when an
portion of a train or an engine is standing on, or closely approach
ing, the switch or detector bar.

618. Levers must be operated carefully and with a uniform mov
ment. If any irregularity, indicating disarranged connections, i
detected in their working, the signals must be restored so as to g
the normal indication and the connections examined.

619. During cold weather the levers must be moved as often a
may be necessary to keep connections from freezing.

620. If a signal fails to work properly its operation must be dis
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continued and the signal secured so as to give the normal indicatio
until repaired.

621. Signalmen must observe, as far as practicable, whether the
indication of the signals corresponds with the position of the levers

622. Signalmen must not make nor permit any unauthorized alterations or additions to the plant.

623. If there is a derailment or if a switch is run through, or if any damage occurs to the track or interlocking plant, the signals must be restored so as to give the normal indication, and no train or switching movement permitted until all parts of the interlocking plant and track liable to consequent injury have been examined and are known to be in a safe condition.

624. If necessary to disconnect a switch from the interlocking apparatus the switch must be securely fastened.

625. During storms or drifting snow special care must be used in operating switches. If the force whose duty it is to keep the switches clear is not on hand promptly when required, the fact must be reported to the Superintendent.

626. If any electrical or mechanical appliance fails to work properly the Superintendent and Signal Supervisor must be notified and only duly authorized persons permitted to make repairs.

627. When switches or signals are undergoing repairs, signals must not be given for any movements which may be affected by

such repairs, until it has been ascertained from the repairmen that the switches are properly set for such movements.

628. Signalmen must observe all passing trains and note whether they are intact; should there be any indication of conditions endangering the train, or any other train, the signalman must take such measures for the protection of trains as may be practicable.

629. If a signalman has information that an approaching train has parted, he must, if possible, stop trains or engines on conflicting routes, clear the routes for the parted train, and give the "Train-parted" signal to the engineman.

630. Signalmen must have the proper appliances for hand signaling ready for immediate use. Hand signals must not be used when the proper indication can be displayed by the fixed signals. When hand signals are necessary they must be given from such a point and in such a way that there can be no misunderstanding on the part of the enginemen or trainmen as to the signals, or as to the train or engine for which they are given.

In giving hand signals for a train to move through interlocking limits against fixed signals, the signalman must be on the ground and use a yellow flag by day, and a yellow light by night.

631. If necessary to discontinue the use of any fixed signal, hand signals must be used and the Superintendent and Signal Supervisor notified.

632. Signalmen will be held responsible for the care of the interlocking station, lamps and supplies, and of the interlocking plant, unless provided for otherwise.

633. Lights in interlocking stations must be so placed that they cannot be seen from approaching trains.

634. Lights must be used upon all fixed signals from sunset to sunrise, and whenever the signal indications cannot be clearly seen without them.

635. If a train or engine over-runs a Stop-signal, the fact, with the number of train or engine, must be reported to the Superintendent.

636. Only those whose duties require it shall be permitted in the interlocking station.

*637. At all interlockings where there is a signalman on duty a signal must be given for each train movement made.

638. At interlocking plants where there is a station signal or block signal operated by the signalman, such signals must not be cleared until after the interlocking signals governing the same route have first been cleared.

639. Signals may be taken away from a train at any time, if anything is discovered that might endanger the safety of the train, and every effort must be made to avoid accident.

640. When it is safe to do so, switches and signals must be operated on the request of sectionmen or inspectors.

Enginemen and Trainmen.

661. Trains or engines must be run to, but not beyond, a signal indicating "stop."

662. If a "proceed" signal, after being accepted, is changed to a "stop" signal before it is reached, the stop must be made at once. Such occurrence must be reported to the Superintendent.

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*[Paragraphs beginning with an astrisk in bold-face type in copy.]

663. Enginemen and trainmen must not accept a "proceed" signal as against fixed signals until they are fully informed of the situation and know that they are protected. When hand signals are given as above for trains to pass fixed signals at STOP, in cases where such signals govern the movement of trains over railroad crossings and drawbridges, the conductor or person in charge of engine or train must send a man ahead to such crossings or drawbridges before passing of same with his train. Where fixed signals are in operation, trainmen must not give "proceed" signals against them.

664. The engineman of a train which has parted must sound the whistle signal for "Train-parted" on approaching an interlocking station.

665. An engineman receiving a "Train-parted" signal from a signalman must answer by the whistle signal for "Train-parted."

666. When a parted train has been re-coupled the signalman must be notified.

667. Sand must not be used over movable parts of an interlocking plant.

668. Conductors must report to the Superintendent any unusual detention at interlocking plants.

6699. No train or engine must act on a signal given for a preceding train, nor, having passed over a route in one direction must it return over the same route without receiving the proper signal to do so.

670. Flying switches must not be made within the limits of an interlocking plant.

671. An engineman receiving a hand signal, as per Rule 663,

must understand that such signal is good only through the interlocking limits and does not extend through the automatic block.

672. All enginemen and trainmen must obey promptly the signals and orders of signalmen within interlocking limits.

Repairmen.

681. Repairmen are responsible for the inspection, adjustment and proper maintenance of all interlocking plants assigned to their care.

682. Where the condition of switches or track does not admit of the proper operation or maintenance of the interlocking plant, the fact must be reported to the Superintendent and Signal Supervisor.

683. When any part of an interlocking plant is to be repaired, a thorough understanding must be had with the signalman, in order to secure the safe movement of trains and engines during repairs. The signalman must be notified when the repairs are completed.

684. If necessary to disconnect any switch, it must be securely fastened before any train or engine is permitted to pass over it.

685. Alterations or additions to an interlocking plant must not be made unless authorized by the Signal Supervisor.

686. Repairmen when on duty, or subject to call, must keep the Signal Supervisor and signalmen advised as to where they can be found, and respond promptly when called.

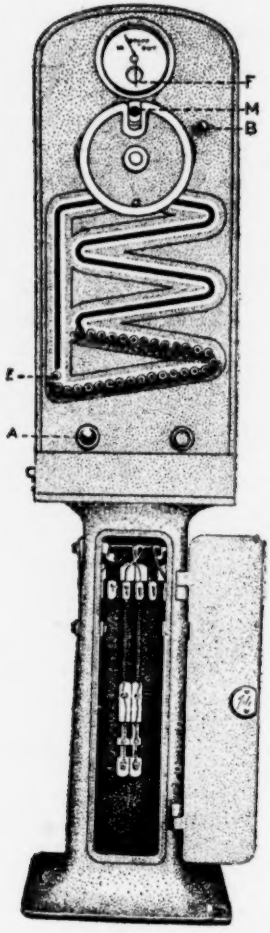

Fig 1.
ELECTRIC HIGH SPEED TRAIN STAFF—MODEL No. 2
Front View of Instrument with all staffs in.

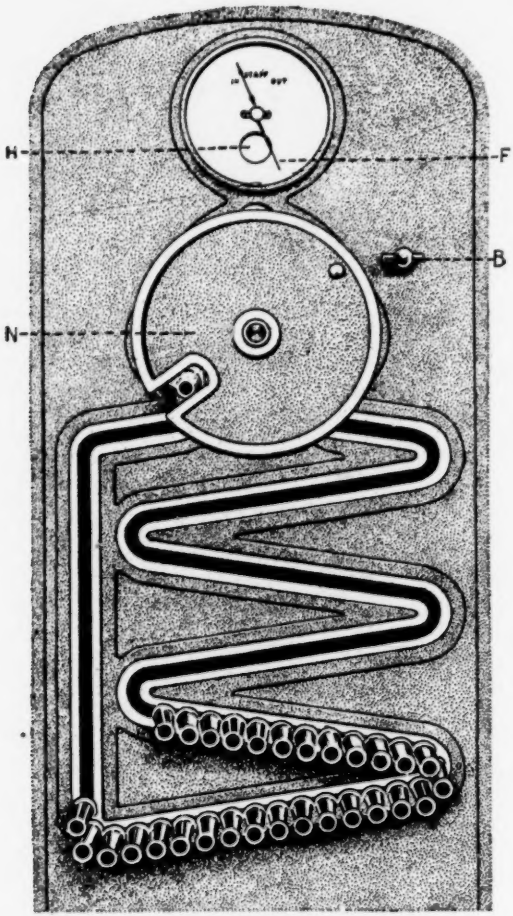

Fig. 2.
ELECTRIC HIGH SPEED TRAIN STAFF—MODEL No. 2.
Front View of head when instrument is in condition for the removal of a staff.

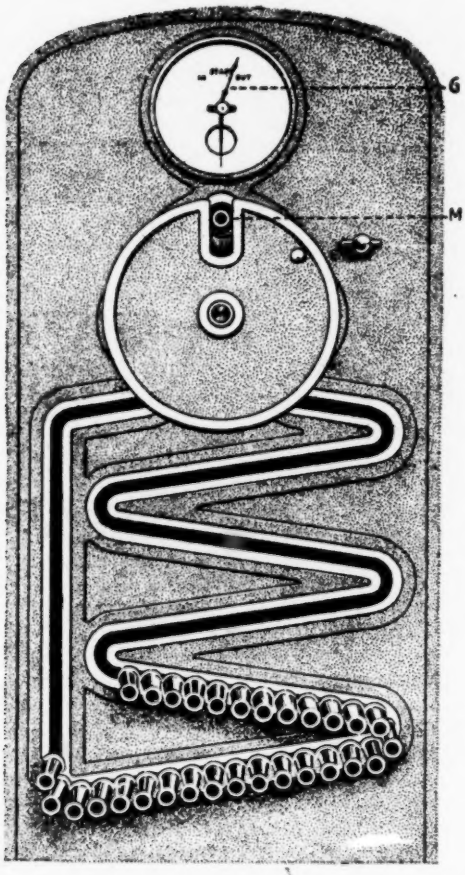

Fig. 3.

ELECTRIC HIGH SPEED TRAIN STAFF—MODEL No. 2.

Front view of head when a staff is released, or about to be inserted.

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GENERAL REGULATIONS.

700. Civil, gentlemanly deportment is required of all employes in their intercourse with the public, their subordinates, and each other. Boisterous, profane, or vulgar language is forbidden. Courtesy and attention to patrons is demanded. Employes must not enter into altercation with any persons, no matter what provocation may be given, but will make note of the facts and report to their immediate superiors.

701. Employes who are dishonest, immoral, quarrelsome, or otherwise vicious, will not be retained in the service..

702. All employes must devote themselves exclusively to the Company's service, attending to their duties during prescribed hours, residing wherever required, and obeying promptly instructions of executive and general officers, and those of heads of departments, in matters pertaining to their respective branches of the service.

703. Employes who are careless of the safety of themselves or others will not be continued in the service.

704. Employes whose duties are prescribed by these rules if discharged will not be reemployed without the approval of the General Superintendent.

705. Employes are required to report any misconduct or negligence affecting the interest of the Company. Withholding such information will be considered proof of negligence or indifference and treated accordingly.

706. No appointment or promotion to the position of conductor

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or engineman will be made until the applicant has been examined as to knowledge and understanding of all rules which relate to his duties and has received a certificate of qualification signed by the proper official.

707. All other persons employed in train service must, before being assigned to duty, pass a satisfactory examination of the rules governing the duties of the position in which they are to be placed.

708. Employes will be regarded as in line of promotion, advancement depending upon the faithful discharge of duty and capacity for increased responsibility.

709. Employes whose duties require service on more than one division or subdivision are under the jurisdiction of the officers of the division or subdivision on which the service is being performed.

710. Unless specially authorized, employes must not use the Company's credit and must neither receive nor pay out money on the Company's account. Property of the Company must not be sold or in any way disposed of except by proper authority.

711. Employes must return property entrusted to their care, when leaving the Company's service, or upon demand by proper authority.

712. Employes are forbidden to offer testimonials to their superiors either directly or indirectly, and those in authority will not

accept such presents or testimonials. The acceptance of gratuities or rewards from passengers or other patrons of the Company is forbidden.

713. Employes must not remove any of the appliances of an

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engine or cars for convenience in switching, endangering the safety of themselves or others; coupling apparatus must be examined and if out of order must not attempt to make coupling. They are warned not to get on the front or rear of an engine or the end of a car as it approaches them, or to go between cars in motion to uncouple, open, close, or arrange knuckles of couplers or follow other dangerous practices.

714. Train and enginemen are prohibited from going to meals, or otherwise delaying their trains from any cause without permission.

715. Employes must not remain near the track when trains are passing, as coal, stone, car doors or other articles are liable to fall from the train. On double track, employes must stand outside and clear of both tracks while trains are passing. All employes are further warned that they must not rely on others to notify them of the approach of a train.

716. It is the duty of employes to report by telegraph defects discovered in track, bridges and equipment, or obstructions of any kind, to the Superintendent, and, when practicable, to the nearest section or bridge foreman. When necessary, proper signals must be used to stop trains, and when there is reason to believe that the safety of the track or any structure is endangered through flood, fire or other causes, every employe, before attempting its use, must make a personal inspection, using all precautions in the interest of life and property.

717. Bridge and section foremen, track walkers, pumpers, and watchmen will observe trains closely and if anything dangerous is noted, such as a loose wheel, defective coupling, brake rod or brake

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beam dragging, or if trains are running too closely together, in violation of Rule 91, must call attention of train and enginemen to the fact, by signal. Train and enginemen should always observe trackmen, bridgemen, and other employes as they pass, and look out for signals from them.

718. In emergencies, or obstruction by accident or other cause, suggestions based upon observation of the actual situation are useful and required, and frequent report of progress must be made. Prompt action is insisted upon and in the absence of designation, the employe upon whom the responsibility most naturally falls will assume authority.

719. In case of damage to trains or structures, wherein the security of Company property or freight is involved, it is the duty of all concerned to see that watchmen are immediately stationed, and that arrangements are promptly made for the protection of such property against thieving or loss from other causes.

720. Minors will not be employed in yard, train or engine service; when employed in other service it must be with the written consent of parent or guardian, on prescribed form, which must be filed with application for employment.

721. Derail switch must be set to derail and locked in that position, whether there are any cars on the track it protects or not, except while cars are being shifted in or out. Trainmen must be on the lookout for derail switches on all side tracks and spurs.

722. Agents, conductors and others entrusted with the books, way bills or the statistics of the Company must, under no circumstances

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permit unauthorized persons to have access thereto nor verbally or otherwise divulge any of the Company's affairs.

723. Employes whose duties connect them with the movement of trains must not absent themselves from, exchange duties with, nor substitute others in their place, without proper authority.

724. Employes will not be permitted to engage in other business without permission of the General Superintendent.

725. Employes must not use the wires unnecessarily. Messages referring to their personal affairs or comfort are not to be offered for transmission on railroad wires, except in case of accident or sickness. Letters of a personal nature must not be sent by train mail; to do so is a violation of the U. S. Postal Laws. Attention of the Superintendent must be called to violation of this rule by those having knowledge thereof.

726. Passengers will not be carried on freight trains, unless authorized by instructions on the current time-table or stock contracts and only between points at which trains stop.

727. Employes traveling on Company business, may be carried on freight trains between points at which trains stop, upon presentation of proper transportation. Trainmen will warn passengers riding on freight trains of the liability of personal injury incident to starting and stopping at stations and require them to remain seated until train has been brought to a standstill.

728. No person will be permitted to ride on an engine, or in baggage, mail, or express cars (except employes in discharge of their

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duties), without a written order from the Superintendent.

729. Dead engines, or disabled engines, with one or both side rods taken down, should not be hauled in fast freight trains when it is possible to avoid it. Under no circumstances must such engines be hauled at a speed exceeding one mile in three and one-half minutes.

Duties of Employes.

750. Bulletin boards, or books, will be provided at localities accessible to conductors, enginemen, yardmen and others concerned in the movement of trains. They must be examined before the commencement of each trip or before going on duty. Failure to do so will not be accepted as an excuse for neglect, or violation of instruc-

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tions contained thereon. Information pertaining to the safety of trains will not be furnished to train or enginemen on bulletin boards.

751. Conductors, enginemen, train and yardmen, signalmen, operators and others whose duties are connected with the movement of trains, must familiarize themselves with the rules governing the duties of others as well as their own and must be prepared, in case of emergency, to act in any capacity to protect the safety of trains.

752. Conductors and enginemen are required to show their train orders to the brakemen and firemen who must read and return them, and, should there be occasion to do so, they will remind the conductor or enginemen of their contents. Conductors must not verbally inform enginemen of the contents of train orders, but

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should obtain from them an understanding of all train orders restricting their rights, if practicable, before they are acted upon.

753. When a flagman is sent out with specific instructions affecting the rights of trains, such instructions must be written in duplicate, one copy to be given to the flagman and the other to be retained by the conductor, who will send it to the Superintendent with his train orders. When a flagman is sent to a siding on a train, he will ride on the engine and the engineman must stop aad let him off at the initial switch.

754. Notice of new time-table must be bulletined at least twenty-four hours prior to its taking effect; for six days thereafter Superintendent must, by train order, require each conductor and engineman to acknowledge receipt of new time-table.

755. Before starting on any district upon which they have not been running, or when absent for six days or over, train and enginemen must inquire for and know that they have the current time-tables and supplements.

756. Conductors and enginemen, whose duties prevent them from having access to a Standard Clock must compare daily with and regulate their watches by those of conductors and enginemen who have standard time and have registered as provided.

757. Trains must not be permitted to stand across another railroad, at grade, if possible to avoid it.

758. Trains must be opened to clear all public crossings while standing at stations, and in no case block a crossing longer than five

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minutes. When passenger trains are at stations, freight trains must be opened to allow passage way.

759. Cars must not be backed, nor cut loose and allowed to run over a street, highway, or private crossing, without a flagman on the front of, or preceding the leading car. By night, a white light must be displayed.

760. In switching, where it is necessary to disturb cars that are being loaded, or unloaded, notice must first be given to all persons in or about the cars that are to be moved. When cars are so moved, they must be returned to the same position as found.

761. On all grades, when stopping on the main track or on a sid-

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ing, when cutting an engine off a train at stations to do work, or at any stops of unusual length, the air must be released and a sufficient number of hand brakes set to hold the train. Both conductors and enginemen will be held responsible for failure to comply with this rule.

Yardmasters.

800. At stations where yard force is employed, trains, or engines without trains, will be under control of the yardmaster, and all employes in train or engine service will be subject to his direction. Road crews of trains entering such stations will be responsible for their respective trains and engines until same are taken charge of by the yardmaster or his representative.

801. Yardmasters will be responsible for the proper position and security of all yard switches. Main line switches in yards, except when in use, must invariably be locked for the main track.

802. Yardmasters will keep advised of important trains, such as

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stock, fruit and manifest and make every effort to get them through the yard with the least possible delay. Freight assigned to particular trains must be forwarded in such trains. In the absence of other instructions, trains may be filled out with nonmanifest in order of its importance. They must see that cars loaded with explosives and inflammable material are placed in the train the prescribed distance from the engine and caboose.

Conductors.

813. The general direction and government of a train is vested in the conductor, and all persons employed on the train will obey his instructions. Should there be any doubt as to authority or safety of proceeding, from any cause, he will consult the engineman and be equally responsible with him for the safety and proper handling of the train and for such use of signals and other precautions as the case may require. He must be vigilant and cautious, not trusting alone to signals or rules for safety. Will obey the instructions of yardmasters within yard limits and be governed by the direction of agents in doing work at stations. Conform to the instructions issued by the traffic and accounting departments.

814. Conductors must report for duty at least thirty minutes before the time set for departure of their trains, and see that their crews are on hand.

815. Before leaving initial points, conductors must see that their trains are provided with proper tools and sufficient supplies of all kinds. Know that the cars in their trains have been inspected, and that the brakes are in proper working order. Compare time with

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their enginemen before starting on run, and with their brakemen, flagmen and baggagemen, as soon thereafter as practicable.

816. Conductors must see that subordinates are familiar with their

duties, ascertain the extent of their experience and knowledge of the rules; instruct them, if necessary, in the proper performance of their work, and caution them as to its risk. Incompetence must be reported.

817. Conductors must not allow other duties to interfere with the proper protection of their train, and invariably require their flagmen to act with the utmost promptness and in strict accordance with the rules. A flagman must always be stationed on the rear car of every train while in motion; on passenger trains the flagman will get on and off of the head end of the last car, and must not, except in case of emergency, disturb the occupants; and must have in his possession the necessary flagging equipment, ready for immediate use.

818. In case of extraordinary rain storm or high water, trains must be stopped, and bridges, trestles, culverts and other points liable to damage, examined by conductors before passing.

819. Conductors must make careful inquiries at all stopping places and when thought advisable, make extra stops to ascertain the extent and severity of storms, taking no risk. In case of doubt as to the safety of proceeding, place train upon the siding and remain there until certain it is safe to proceed.

820. Conductors must inspect the running gear and brake and draft rigging of trains as often and as closely as practicable while on the road, require their men to assist in such inspection, remedy as

far as possible any defects discovered and remove from the train cars that are unsafe to run. Special attention must be paid to hot boxes.

821. In leaving cars on side tracks, conductors must see that they are left clear of any street, highway or private crossings. Must not leave cars on passing tracks when there is room for them on other tracks; if so left, immediately notify train dispatcher by wire. See that a sufficient number of hand brakes are set to hold the cars on side tracks. If brakes are inoperative, cars must be properly secured. When the side track is on grade, if practicable, couple the cars together, and in addition to setting the brakes, block the wheels. When doing work at stations, where the grade is such that cars will start if brakes are released, a trainman must always be left in charge of the train.

822. In case of injury to persons, loss of life or damage to property, conductors must furnish a full and exact statement of all the facts, with the names and addresses of all persons who witnessed or have information concerning the accident; written statements to be obtained whenever possible. In case of death on their trains from accident or otherwise, or of the killing of any person on the track by their trains, see that the proprieties are observed and that the body receives appropriate care and is removed as soon as possible to a proper place and left in charge of a public officer or an agent of the Company.

823. If a conductor discovers any defect in track, bridges or cul-

verts, which might cause an accident, he must not rely wholly upon the telegraph to notify other trains, but must leave a flagman.

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824. When starting from stations, brakemen must watch closely to see that brakes are fully released, and will immediately signal enginemen to stop if wheels are found sliding. Each brakeman will be held responsible for any wheels slid flat under the part of the train in his charge. Conductors in reporting flat wheels will give the name of brakeman in charge.

Passenger Service.

835. Conductors must not allow passengers to carry in the coaches bulky packages or other articles which obstruct the aisles, seats, or the space between the seats, to the inconvenience of other passengers.

836. Conductors must not allow drunken or disorderly persons to get on their train, nor permit obscene, profane or other ungentlemanly language, damage to Company property, or other misconduct in any of the cars.

837. Side and trap doors of vestibules must be kept closed while train is in motion.

838. When examining tickets, conductors must notify passengers destined to points on branch or connecting lines, where they are to change cars, also where they will find the trains of such lines.

839. As far as possible, conductors must see that passengers are provided with seats, and that no one is allowed to occupy more than a single seat to the exclusion of others. When there are not seats enough in the coaches and there are vacant seats in any parlor or sleeping car (except chartered cars) passengers may be seated therein and train conductors will arrange with parlor or sleeping car con-

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ductors accordingly. Such seats must be surrendered as soon as there is room in the coaches or whenever they are wanted for regular use. Seats in the sleeping cars must not be so assigned or occupied at night after the regular passengers have retired.

840. Train employes must not occupy seats with passengers, nor enter into conversation with them further than is required in the discharge of their duty, but will contribute as far as possible, without being unduly officious, to the convenience and comfort of passengers, and give particular attention to women and children who are unattended, and to all persons who are ill, infirm, inexperienced, or otherwise unable to care for themselves. They must not solicit business for any hotel or transportation company.

841. Conductors must look out for confidence men, monte players, prize package venders and other swindlers; have them watched, personally warn passengers and if any attempt be made to defraud them, must prevent it and report case by wire to the Superintendent. They must not permit beggars or unauthorized peddlers to practice

their vocations on the train, nor allow advertising matter to be distributed.

842. The proper announcements necessary for the information and guidance of passengers must be made by trainmen approaching stations, junction points and eating houses, and at terminals and junctions before the departure of the trains. Conductors will see that employes of sleeping or parlor cars advise their passengers when they are to leave the train.

843. Conductors must use discretion if necessary for any reason to eject a passenger from the train. They will be governed by local

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rules, State Laws and the proprieties. If in doubt as to the right of a passenger to continue on transportation presented, or as to the proper course to pursue, the facts in the case will be reported by wire to the Superintendent. In case a passenger is ejected from the train, the names and addresses of all witnesses should be obtained and their statements in writing if possible.

844. Articles found on trains must be delivered to station baggageman at terminal or junction stations, and his receipt obtained on form provided for that purpose.

845. Upon delivery of their trains to relieving conductors, inform them of any facts which it may be necessary or proper for them to know in taking charge. Care must be exercised to properly transfer transportation with the passengers. Passenger trainmen will remain by their trains at terminals to answer inquiries and assist passengers until the train is vacated.

846. Conductors will see that all telegrams entrusted to their care are promptly delivered. Receipts will be taken for commercial telegrams. If for any reason they cannot be delivered, conductors will endorse this fact upon the envelope and hand it off at the next telegraph station.

847. Conductors must give particular attention to the safety and comfort of their passengers, to the heating, lighting and ventilation of cars, and the supply of water in tanks.

848. No gunpowder, dynamite, nitro-glycerine, or similar explosive will be transported in any car attached to a passenger train.

849. No person will be allowed to ride free except as specially provided. Conductors must collect fare from all persons traveling without a ticket, being allowed no discretion.

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Freight Service.

857. Freight conductors are responsible for the security of all freight carried by their trains, while in their charge, and for its delivery, with the necessary way-bills or manifests, at its destination or at terminals. They must examine the fastenings of cars and keep such record as will enable them to answer all inquiries.

858. Comply with instructions of agents in placing cars and doing other station work. In case instructions are unreasonable, the facts

must be reported to the Superintendent; but the instructions must be executed, if practicable, without endangering or delaying first-class trains.

859. Conductors must give proper attention to the handling of live stock and its attendants, being governed by special instructions relating thereto.

860. The doors in empty cars in trains must be kept closed. The doors of loaded cars must be closed and properly secured, unless left open for ventilation. The instructions relative to ventilation of perishable commodities must be closely observed.

861. Conductors must see that their crews are so distributed over the train as to control it most effectually and to be able to pass signals from any part of it to the engineman. In cold or inclement weather they may allow their men to ride in the caboose or on the engine, so far as is consistent with safety, but in descending long grades, at all points where trains are met or passed, before reaching the whistling posts, approaching and passing telegraph and other time-table stations, railroad crossings and other points where train may be required

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to stop, trainmen must all be in proper position on top of the train.

862. Conductors must see that their cabooses are kept in a clean and tidy condition and that the floors and windows are washed as often as may be necessary. The use in cabooses of stoves, other than those furnished by the Company, is forbidden.

863. Conductors will see that the words "Bad Order" are written with chalk on both sides of bad order cars left at stations, and defective parts marked with a cross. They will also attach damaged car card, Form 2427, and report damage by wire to the Superintendent giving initial and number, and if loaded, contents and destination.

864. Conductors must familiarize themselves with all the rules pertaining to the loading, unloading and handling of freight. They will not allow unauthorized persons to examine way-bills.

865. Conductors must not take freight, either in car-load or less-than-carload lots from a station where there is an agent without the regular way-bills or card-bills, nor if the cars are in his opinion unsafely loaded, in which case report must be promptly made to the Superintendent.

Enginemen.

875. Report for duty at least thirty minutes before the time set for the departure of train; see that fireman is on hand, and remain on duty with engine until it is delivered at the designated place at end of trip, or until properly relieved.

876. When there is no conductor, or when the conductor is dis-

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abled, the engineman will, unless otherwise directed, have charge of the train and will be governed by the rules prescribed for conductors. When more than one engine, the senior engineman will assume these duties.

877. See that firemen are familiar with their duties, ascertain their knowledge of the rules, instruct them, if necessary, in the proper performance of their work and caution them as to its risks. Incompetence must be reported.

878. Examine bulletins, provide themselves with current timetables, and see that engine has the ncessary signals, tools and supplis before starting on each trip.

879. See that all connections between the engine and the train, also between engines when double headers are used, are properly and securely made.

880. Give special attention to the care and condition of signals prescribed in Rules 20 and 21, and to markers when used on engines, and see that proper train signals are correctly displayed. Flags must be kept clean and the lamps kept burning brightly when in use.

881. If headlight fails, use a lantern in its place, notifying Superintendent. Headlight of forward engine must not be concealed while engines are moving.

882. While switching, the engineman and fireman must remain on the engine. Exercise great care in handling engine while yardmen or others are making couplings and give close attention to signals.

883. Allow no one to handle engine, except the fireman, when competent.

884. Exercise great care to prevent water being thrown from

smoke stack when starting, and do not open cylinder cocks nor permit overflow from injector at station platforms.

885. Require the firing to be done in such a manner as to avoid dense smoke, and use the blower gently to prevent smoke trailing when at stations.

886. Never interfere with the safety valves or allow the boiler pressure to be above the limit at which the valves are set. Steam pressure must be regulated to avoid the escape of steam from safety valves.

887. If a train makes an improper station stop, it must not be moved until the conductor gives the proper signal to do so. If, after making stop at a water station, it should be necessary to move the engine to take water, it must not be done while passengers are leaving or entering the train.

888. On passenger trains immediately after leaving an initial station, or at any point where the train line may have been broken, and on freight stations at least one mile before reaching a railroad crossing at grade, drawbridge or other stopping place, or before descending a heavy grade, the air must be applied and the brakes tested sufficiently to ascertain if they are in working condition.

889. Keep a constant and vigilant lookout; carefully note all signals; see whether other trains are displaying signals, and observe the position of switches while running, also watch for obstructions and defects of track, and frequently look back, especially while

rounding curves, to see whether the train is intact, and require th
fireman to do the same.

890. Be alert in all matters pertaining to safety, and when i

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becomes evident that rear of train requires protection, immediatel
sound whistle signal for flagman, and, if necessary, repeat the signa
until protection is assured.

891. Engine must be supplied with flag, lamp, torpedo and fuse
signals, and enginemen must know that their firemen are conversan
with and properly understand the application of rules relating t
protection of trains.

892. While running by night, have in cab, where it cannot b
seen by passing trains, a red light, with sufficient torpedoes attache
thereto, and in case of danger, signal approaching trains. By nigh
when standing or moving about yards, detached engines must displa
a red light to the rear. Keep in mind the number and location o
switches at each point, so as to know before reaching them wheth
all are lighted; and if they are not, reduce speed until track is know
to be clear. Report all such failures.

893. During foggy, or stormy weather do not attempt to recov
lost time; take extraordinary precautions, both at switches and at a
places where authority to proceed depends upon signals.

894. During and immediately after severe storms run with cautio
over track likely to be damaged.

895. If reason to believe that their run has passed over any dange
ous defect of track or roadway, stop at once and notify the conducto

896. Read all rules, special instructions and notices involving th
movements or safety of trains and see that they are read and unde
stood by fireman.

897. Report to Master Mechanic any defect or improper conditio

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of engine, and, at the end of each trip enter on the work book th
repairs required.

898. When a train has more than one engine the air will b
handled by the leading engine; any other requirements of the rul
apply alike to all enginemen, except that the use of the engine be
and whistle shall be limited to the leading engine. Special instru
tions governing the use of the air brake, steam heat, etc., must b
observed.

899. Engines must not be left without man in charge, except
designated places; and must not be left standing in such positio
as to block movements on adjoining tracks. Never allow engi
to stand on main track unless properly protected under the rules.

900. Must not permit engines to stand nearer than 100 feet to
street or highway crossing, or under any bridge, when it can b
avoided; nor in the vicinity of waiting rooms, telegraph offices o
near cars occupied by passengers where the noise or smoke will di
turb the occupants.

901. Exercise caution and good judgment in starting and stoppin

trains to avoid violent or sudden movements which might cause discomfort or injury to passengers, or damage to property.

902. Use great care to avoid striking stock, stopping if necessary. When stock is inside of right of way fence notify sectionmen, also Superintendent. Should any be killed or injured, make report on prescribed form.

903. Must not sand or clean ash pans or front ends on switches, frogs or interlocking fixtures. Fire must be promptly and thoroughly

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extinguished at points where ash pans are cleaned. Dampers of ash pans must be closed and grates must not be shaken when passing over bridges and trestles. Do not allow anything to be thrown from engine that may cause injury to persons or damage to property.

904. Know by personal examination that tools, signal appliances, etc., carried on the engine, are in good and serviceable condition, also that there is a full supply of fuel and water, dry sand and other necessary stores.

905. Render necessary assistance in switching and making up train. Use great care in backing to take train, or backing into sidings to take or leave cars, approaching slowly enough to allow coupling without injury to person or property. Be sure that engine is under control when approaching switches which are to be thrown. Look out for derailing switches in side tracks.

906. Enginemen must know their time on the road, and will not start from a station, even though they receive a signal from the conductor, unless they can reach the next station in time to properly clear superior trains.

907. Irregular trains and regular trains behind time must sound the whistle repeatedly in obscure places to warn section and bridge men. The same precautions must be used in fogs and snow storms.

908. Enginemen must use every precaution to prevent setting fires along line. They must carefully and frequently inspect netting or other apparatus provided for arresting sparks and see that it is in good order. They must know that sand used for cleaning flues

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contains no foreign substance whatever, and as far as practicable will sand flues in the vicinity of section gangs.

Station Agents.

916. Agents must not be absent from their stations, grant leave of absence to their subordinates, or make any change in their forces without permission.

917. At stations where yardmasters are not employed, agents will be held responsible for the proper security and position of switches, which must be locked for the main track. They will in no case allow them to remain turned from the main track, except when in actual use, and they must know before leaving the station at night that switches are secure and that everything is in order for the safe

passage of trains. They will also be held responsible for the proper position and locking of derailing switches.

918. Agents must make daily inspections of yards, platforms, offices, buildings and surroundings, and co-operate with supervisors and roadmasters in maintaining the neat and tidy appearance of same. See that the station platforms and walks are properly cleared of snow, ice, or dirt, and that rubbish is not allowed to accumulate about any of the buildings.

919. Agents have charge of employes at stations, see that they properly perform their duties and are courteous and considerate in their intercourse with the public.

920. Agents must acquoint themselves with the business interests of the people among whom they are situated, use all proper means to secure traffic and act with the view of accommodating the public

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and promoting the best interests of the Company, notifying the Superintendent and heads of departments of anything affecting their departments, prejudicial thereto, or conducive to its good, present or prospective.

921. All cases of attempted robbery, theft of property belonging to or in charge of the Company, damage to property by fire or storm, personal injury and other extraordinary occurrences at or in the vicinity of station, must be promptly reported by wire to the Superintendent.

922. Agents must see that the freight and passenger tariffs and all notices to the public are neatly posted in conspicuous places in the station; other advertising matter must not be posted on the premises except when properly authorized, and then only at places designated for the purpose. Where train bulletin boards are provided, see that proper entries are made thereon.

923. Agents must preserve order in and about the station, exclude from the station and platforms intoxicated and disorderly persons or loungers who interfere with the comfort or convenience of patrons or obstruct the station work, and all persons engaged in unauthorized occupations.

924. Agents must indicate the places where hacks, omnibuses and other vehicles shall be allowed to stand at the station, and where the persons in charge thereof, hotel runners and other solicitors shall remain while engaged in their duties on the Company's premises, and remove therefrom any such person who does not comply with these directions. Do not permit bicycle riding on station platforms.

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925. Agents must see that waiting rooms and other apartments for the accommodation of passengers are thoroughly cleaned and properly heated, ventilated and lighted. When stations are open for business after dark, see that the platforms are adequately lighted when practicable. Waiting rooms, ticket offices and baggage rooms must be open at least thirty minutes, or other period required by law, before the departure of passenger trains scheduled to stop, and at such other times as may be necessary.

926. Agents whose duties are in any way connected with the handling of United States mails must be familiar with and governed by the "Instructions and Information relative to the Transportation of United States Mail" issued by Superintendent of Mail Service.

927. Give prompt attention to correspondence; keep the books and accounts promptly and neatly written up, in the manner prescribed by the accounting and other departments to which they relate, and submit them to the traveling auditor or other authorized officer for examination as may be required.

928. Agents must not allow shippers to leave decayed fruits or vegetables in cars or on station grounds.

929. Agents must never throw a switch for a trainman, except where, by special instructions, it is made their duty. Agents must see that stations are furnished with necessary signal equipment, and ready for use. Should anything endanger the safety of trains on main tracks, see that proper signals are immediately displayed.

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930. Agents must not permit bill-boards to be erected nor material placed in such position as to precent a plain view of approaching trains, and see that cars on sidings are not left where they will obstruct view of the main track and have their brakes securely set, and when such sidings are on grade, or if the brakes are defective, that the wheels are securely blocked. When there are indications of heavy winds, see at once that cars are so secured that they will not move.

931. Agents must make every effort to obtain cars for shippers at the time desired, but must not promise to furnish them within a specified time, unless so advised. Order daily, or oftener when necessary, from the chief train dispatcher, stating the kind of freight, and destination, also the route when for points off the line. Endeavor to furnish cars of proper capacity to accommodate freight and, except when evidently not in condition to make it safe, all cars should, when practicable, be loaded to ten per cent above marked capacity. Should not forward cars loaded beyond ten per cent in excess of their marked capacity. See that all cars furnished for loading are in proper condition for the class of freight to be loaded and report to the chief train dispatcher cars received that are unfit for the purpose required. When the demand for cars exceeds the supply distribute the available cars in proportion to the actual requirements of shippers, their ability to load promptly, and with due regard to sequence of their orders. See that cars are loaded and unloaded promptly, and that the rules for the collection of car service are rigidly enforced.

932. When unloading of cars is delayed by refusal of consignees

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to accept freight, or from any other cause, agents must report the matter to the proper officer and obtain disposition therefor. Immediately upon arrival of cars containing Company material, the

party to whom the shipment is consigned should be notified, and on hand over twenty-four hours, notify the Superintendent.

933. Agents must not allow advertisements to be placed on an freight car, other than a notice relating directly to the business the shipper by whom the car is loaded, to be printed on cloth, pap or cardboard, not exceeding in size two feet square, which mu be attached to the car with cleats or tacks; paste or glue must nev be used. Such notices must not be placed over car numbers, initia or other inscriptions relating to the service of the car.

934. Remove all advertisements not provided for in this ru before forwarding the cars, and the signs which are permitted to used must be removed on arrival of cars at destination.

935. Agents must furnish conductors switch list. Make eve effort to avoid delay in the movement of cars, both loaded an empty; see that they are promptly forwarded by the proper train

936. When cars are left short of destination report by wire to t chief train dispatcher, stating their contents, destination and wh left. Also report the date and train upon which forwarded. Prom notice must be sent to the chief train dispatcher of the completi of repairs to disabled cars.

937. Inflammable oils and explosives will be received only in la light. The packages must be substantial and in good conditio

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They must not be handled through freight houses when it c be avoided. Freight of this character must be kept by itself an separate from other freight, so far as practicable both at statio and in cars. The regulations of the general freight departme must be carefully observed. See "High Explosives."

938. Agents must see that all freight loaded is safely and proper stowed and, when necessary, is securely fastened by braces, bloc cleats, stakes, chains, or other means, as the nature of the freig may require, to prevent loss or damage by falling,, shifting, cha ing, breaking, or by contact with any contaminating substance. loading way cars, stow freight in station order. Allow nothing be loaded on the roof of a car.

939. The loading of lumber, timber and other freight on op cars, must be in general conformity with the specifications and di grams of the Master Car Builders' Rules, printed copies of whi will be furnished to agents for use of shippers upon application the Superintendent.

940. For shipments to points on other roads, strict conformi to the Master Car Builders' Rules of Inspection is required.

941. Apply the required cards to cars as indicated by the speci instructions relating thereto and remove all old cards, except hon route and M. C. B. defect or repair cars, before cars are forwarde

942. Local freight to be loaded or unloaded must be checked b the conductor and agent together and anything irregular noted o the way-bill.

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943. Agents must see that all less-than-carload shipments of freight are plainly marked showing consignee and destination, and that all old marks are erased.

944. Agents must see that all freight which requires shelter is promptly placed in freight house or in cars.

945. Freight houses must be locked, and cars containing freight, which can be closed, must be sealed or locked at all times, except when the agents or other authorized persons are in immediate charge thereof.

946. Freight, baggage, or express must not be left between main tracks, nor within six feet of the edge of main track platforms.

947. Skids, trucks and scales when not in use should be placed in baggage room or warehouse; if necessary to leave them on platforms, they should be lined up at the end or in the rear of station building, and must be locked or otherwise secured.

948. Unless otherwise instructed, agents must not use cars on hand nor order cars for partial loads of freight that can be loaded in local freight trains.

949. Before loading stock, agents must examine cars carefully to see that they are in good order. After loading, doors must be closed and all fastenings firmly secured.

950. Agents must see that stock-yards are kept in good condition, and that the gates of the pens and chutes are closed and securely fastened when not in use.

951. They must, when authorized to act as agents of any express or other company, give preference to the business of the railroad.

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952. Agents must familiarize themselves with the boundaries of the Company's property at their stations, and must not permit any encroachment thereon.

953. Unless provided for by lease, they must not allow any commodities to be placed on grounds or right of way at their stations for the purpose of storage without written permission from the Superintendent, and then only after release on prescribed form has been executed by the owner.

Operators.

968. Chief Train Dispatchers are division operators on their respective districts, unless otherwise arranged, and will represent the Superintendent of Telegraph, have immediate supervision and control of the operators and linemen (except where otherwise specially arranged), and of tests and repairs of wires, and will report to the Superintendent of Telegraph in all matters pertaining to the telegraph service, keeping him promptly and fully advised as to the condition of wires and interruptions, and enforce the rules and instructions of the telegraph department. Will see that wire interruptions are promptly tested and definitely located, so linemen will not lose time in finding and removing cause. Interrupted wires

must be tried frequently, in order that they may again be placed in service as soon as possible after trouble has been removed.

969. Operators will devote themselves to the telegraph service first; those who have additional duties as agents or clerks must be within hearing of their instruments, when possible, and such additional duties must not conflict with the utmost promptness in the discharge of all telegraph business. Are expected to assist in

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clerical and other station services when called upon, their telegraph duties permitting.

970. They are required to be constantly on duty during the hours assigned them and must not leave their offices for the night, without permission from the dispatcher on duty.

971. Must not in any way make public the fact or particulars of accidents, or communicate them to any person whatever, except the proper officers of the Company. Contents of all messages must be held strictly confidential, and in no manner be made known to any person, except the one addressed, nor be made the subject of remark along the line. Violations are punishable under state laws.

972. Operators will advise the Superintendent promptly as to severity of all storms and extent of damage. When there are indications of heavy winds, cloudbursts, or abnormal weather conditions, they must see at once that cars at their stations are so secured that they will not move and obstruct main line.

973. Operators must notify yardmasters of special passenger, or other important extra trains, so they can expedite movement through yards.

974. Transfer, consisting of record of outstanding train orders, all overdue trains and undelivered messages, must be made by the operator, on Form 2954. A copy of all train orders issued must be filed in the station records; each month's' business should be labeled and tied in a package showing month and year. When a year's business accumulates it will be enclosed in one package and properly

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labeled. It is important that a copy of all train orders be preserved so they can be produced at any time required.

975. Operators must never throw a switch for a trainman, except where, by special instructions, it is made their duty.

976. Operators will be held responsible for the prompt delivery of messages at their stations. When answers are required, they must make every reasonable effort to obtain them. In case the person to whom the message is addressed cannot be found, they must notify the office at which it originated, without delay.

Station and Train Baggagemen.

980. Station and Train Baggagemen will have charge of the baggage entrusted to the care of the Company for transportation. They will obey the instructions of the Superintendent and comply with

those of the General Baggage Agent, Passenger and Accounting Departments. Their duties are defined by "Manual of Instructions to Station and Train Baggagemen."

Car Inspectors.

986. They must inspect all cars passing their stations and make such repairs as are necessary, giving special attention to cars running in first class trains. In inspecting passenger cars at terminal stations, see that they are properly washed, equipped and warmed; that all fixtures are clean, in good order and ready for use; that all lighting and heating apparatus is in proper condition, are supplied with fuel, water and ice; the running and draft gear in good condition, and that the air signals, also air and hand brakes are in working order. At other stations, inspect all trains upon their arrival

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and see that the running gear, brakes and other fixtures are in good condition, and be prepared to make any light repairs that may be required; should a car need repairs which will occupy much time it must be promptly carded for set-out and conductor, agent, or yardmaster notified.

987. Assist switchmen and trainmen to couple and uncouple all air and steam connections on first class trains and carefully examine the couplings after the trains are made up. Uncouple the air hose and bleed the auxiliary reservoir on all freight cars left at division stations, or arriving at terminals. When freight trains are made up ready to go out, it will be their duty to see that all hose couplings are properly made in such trains and see that the air brakes are properly connected through the train and all valves in auxiliary reservoirs are closed.

988. When inspecting or repairing cars which they do not wish moved, they must protect themselves by placing conspicuously a blue signal on both ends of the car, as provided in Rule 26.

989. When necessary to make repairs on a car in a train, they must place blue signals upon both ends of the train before commencing work. If an engine is attached to it, they will place a blue signal upon the engine where it can be plainly seen by the engineman and fireman.

990. Be conversant with and conform to the Master Car Builders' Rules of Inspection, for all shipments, and must familiarize themselves with the clearance in all bridges, tunnels, snow sheds, etc., on this line, and not permit cars to go forward loaded in such manner as to be damaged by these obstructions.

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991. Be familiar with the rules for the inspection of safety appliances and shall see that all cars are in conformity with the National law on this subject before the cars are forwarded.

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(Here follows map, marked page 794.)

(Here follows photograph, marked page 795.)

PACIFIC HOTE

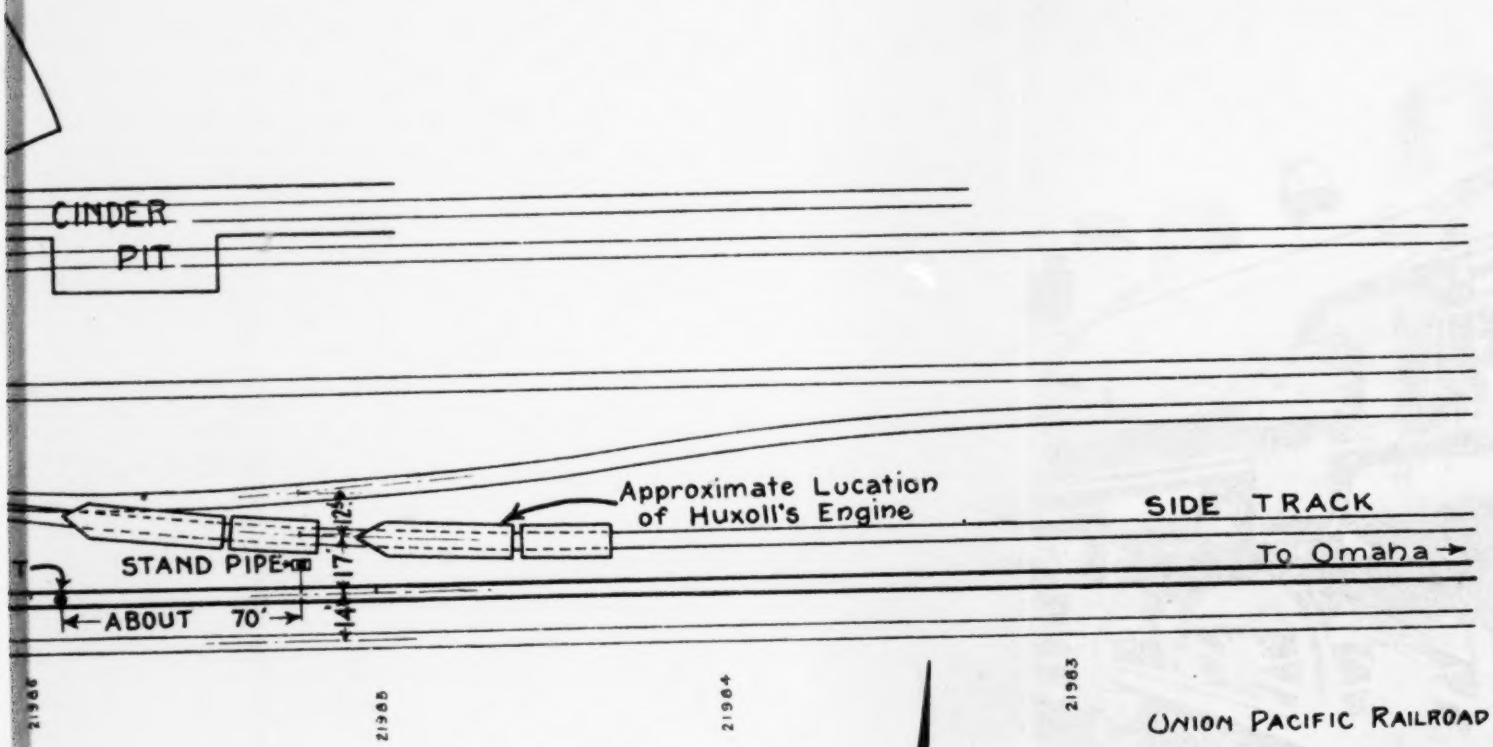
←To Ogden

21954

21953

21952

ENG. HO.
COAL SHED
ENG. HO.
WASH & LOCKER HOUSE
OFFICE
TURN TABLE
-40.3 HB
21'
27.7'
+47.8 HB.
MAIN TRACK
LOCATION OF
PASSING TRACK
2+99.1
2+90
18+47.1
2+89
2+88
2+87



21966 21965 21964 21963

UNION PACIFIC RAILROAD

PART OF

SIDNEY. NEBR.

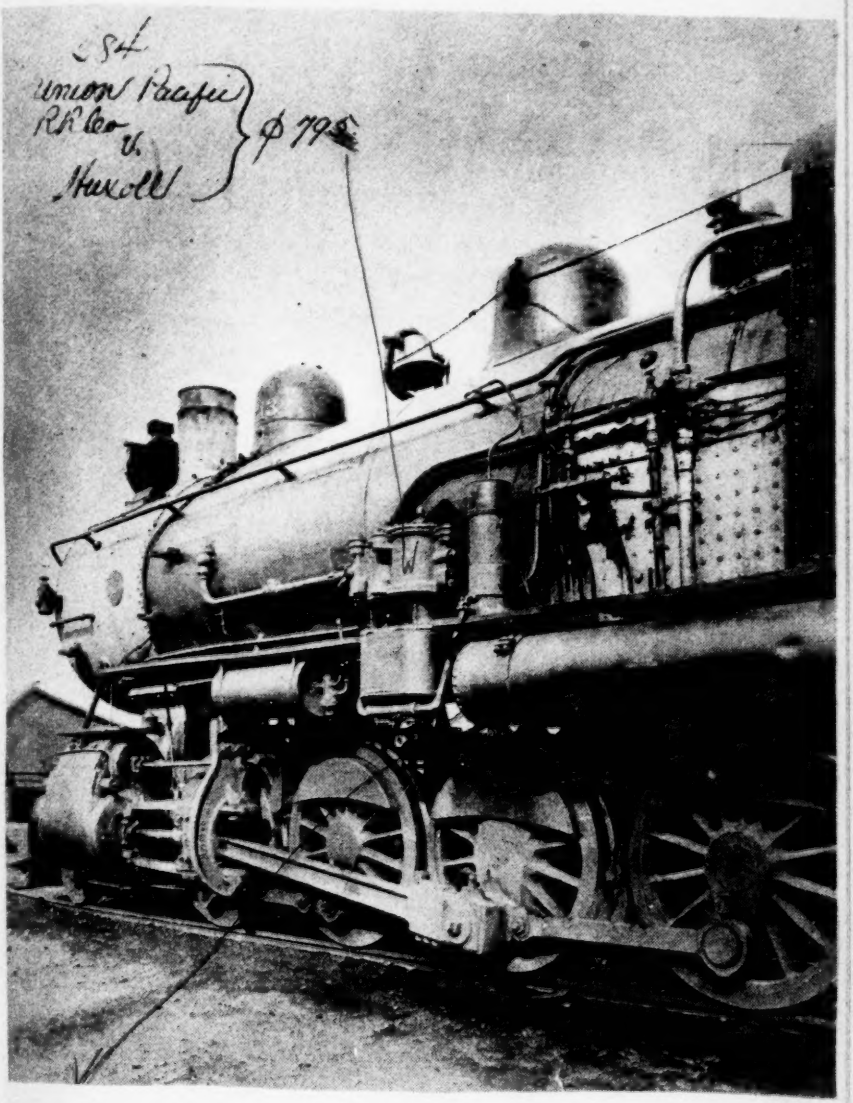
SCALE 1" = 30'

Reproduced from Ass't. Sup't's Map dated March 25, 1911

Ch. Engr's Office U.P.R.R. Omaha, Nebr. Sept. 22, 1913

DRAWING NO. 21697.

(Exhibit B attached to this sheet.)



796 (Exhibit 6 attached to this sheet.)

EXHIBIT No. 6. Calvin A. Emery, Court Reporter, Lincoln, Nebr.

Second Trial.

In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix of the Estate of FRED HUXOLL, Deceased, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, a Corporation, Defendant.

Stipulation.

To save time and expense incident to taking depositions of five witnesses of which there has been notice served by plaintiff to take same on this date at Sidney, Nebr., but the Defendant reserving all rights of objection to the matters hereinafter agreed upon as facts either on account of materiality or relevancy, it is by the parties agreed that between the hours of 9 and 10 A. M. January 1st, 1911, Fred Huxoll was called by the defendant at Sidney, Nebraska, to take Engine 1909 to leave at 11:10 A. M. and proceed right in connection with another Engine 1913 and proceed east to Perdue side track to bring into Sidney a freight train.

It is further agreed that the Engine which Huxoll was to take pursuant to said call was headed westward, that is to say it was to run backwards from Sidney to the freight train above mentioned; and to go with said Huxoll as Conductor to bring in said train was B. R. Fletcher and the Engineer on the other Engine was Engineer Tom Orton.

Deft. reserves the right to object on trial for immateriality or irrelevancy of facts in this stipulation.

Dated Sidney, Nebraska, Dec. 31, 1912.

HOAGLAND & HOAGLAND,
Attorneys for Plaintiff.
EDSON RICH,
E. F. PETTIS,
Attorneys for Defendant.

797 (Exhibit 7 attached to this sheet.)

EXHIBIT No. 7. Calvin A. Emery, Court Reporter, Lincoln, Nebr.

Second Trial.

[Stamped:] Union Pacific Railroad Co. Received Jan. 12, 1911. Gen'l Claim Agent, Omaha, Neb.

Form 3572-1.

Sheet No. 1. P. I. Fred W. Huxoll.

Statement of Chas. B. Matthews, Married, 28 Years Old; Wife's Name, Maggie.

Residence, Sidney, Neb.
Business, Fireman. Place, Sidney, Neb. Yards.
What day what hour did this occur? Jan. 1st, 1911, about 11 A. M.
Where did it occur? Just west — Water Crane near Turn Table Sidney Yards.
Where were you when in occurred? On Engine #213.
Do you know anyone who saw the accident? Please give their names and address. No one.
Did you see the accident? No.
Give full account of accident as witnessed by you. I have worked for U. P. R. R. Co. about 8 or 9 years. Have been fireman on switch Engine off and on for 3 months. On Jan. 1st, 1911, I was fireman on Engine 213—a road Engine—4 drivers on a side—which we were using as a switch Engine in Sidney U. P. Yards. Zimmer was Engineer. In our crew was Borton, Foreman—Hower and Riggs switchmen—Jan. 1st, 1911 was a cold stormy day—fog and steam from Round House & Engines settled on tracks which are on south side of Round House—Fog was so dense at times I could scarcely see the Engineer in our Engine. We were doing some switching on House track and when we got through went down track #3 & got out on main line and started west towards Depot.

Dated Jan. 2nd, 1911. 1.

Form 3572-2.

Sheet No. 2. P. I. Fred W. Huxall.

Statement of Chas B. Mathews.

Our Engine 213 was headed east when we got out on main line & when we were going west our Engine was backing up—when we started west backing up from east end of yard—Zimmer engineer Riggs switchman and I were all that were on the engine that I saw—

 (Exhibit 8 attached to this sheet.)

EXHIBIT No. 8. Calvin A. Emery, Court Reporter, Lincoln, Nebr. Second Trial.

[Stamped:] Union Pacific Railroad Co. Received Jan. 5, 1911. Gen'l Claim Agent, Omaha, Nebr.

Form 2611. J-1-27-08-15M.

UNION PACIFIC RAILROAD COMPANY.

REPORT OF PERSONAL INJURY TO EMPLOYES, PASSENGERS OR OTHER PERSONS.

INSTRUCTIONS—A separate blank must be filled out for each person injured, whether the injury is severe or slight, by each employe present. EVERY QUESTION THAT WOULD PERTAIN TO THE ACCIDENT REPORTED MUST BE ANSWERED FULLY. If blank spaces are insufficient for full statement, answer further in form of letter and attach hereto.

1. Name, residence (street and number) and P. O. address of person injured.
Fred J. Huxoll, No. Platte, Nebr.

2. Age.
28 years

Occupation.
Loco' Engineer

3. A. Married or single.
Married

If married, name and residence of wife or husband.
Not Known

B. If single, names and addresses of father, mother or nearest relatives.

4. A. Employe, passenger, traveler on highway or trespasser?
Employee

If employe, how long in service of this Company, and in what capacity?
Do not know

B. If passenger, where from and destination?

Ticket or pass?

C. If unknown, give full description (height, weight, hair, eyes, marks and clothing) and state what articles found on person.

5. State fully the nature and extent of injuries.
Unable to say fully

6. A. What was done with and for the person?
Sent to Hospital, Cheyenne

By whose direction?
H. J. Roth's office

B. If not sent to hospital, why not?

C. Name and address of surgical attendant?
Dr. H. E. Mantor, Sidney, Nebr.

D. If dead, state disposition of remains. (Attach copy of verdict of Coroner's Jury, if inquest is held.)

7. A. Date, hour (day or night), and exact point where accident occurred.
Jan., 1st, 1911, about 11:00 A. M. at water spout east of Depot, Sidney

B. If at night, was it very dark? Kind of weather.
Stormy and very cold

C. Did accident occur on or near a crossing? (State name, and distance and direction from same.) Was watchman on duty?
No

D. Was view of trainmen or injured person obstructed? If so, by what? State fully.
Yes.....by steam

E. Distance person was seen before accident.
Not seen

F. Could train possibly have been stopped between the time collision was imminent and time of accident?

G. On main line or side track? Curve or straight line? (State whether curve to right or left.) Up or down grade?
On main line | straight | level

8. A. Train No. Conductor, yardmaster or foreman.
No Train | W. A. Borton

B. Engine No. Engineer. Fireman
213 | R. H. Zimmer | Chas. Mathews

C. Baggageman. Head Brakeman. Rear Brakeman and Porter.

D. Switchman. Other Employes.
M. W. Riggs | Paul J. Dupont, Fireman

E. No. cars in train. No. loads. No. cars with air brakes. In what direction was train moving?

F. Were all air brakes connected? If not, state why.

G Was headlight burning? What kind of headlight?

H. Speed of engine or cars at time of accident. If train late, how much? If backing up, who was on rear end?
Not to exceed 3 miles per hour

9. State your location with reference to point of accident, and whether you were an eye witness.
Not an eye witness. Both on engine.

10. What was injured person doing at time accident accured?
Going to his engine

11. Give full particulars of cause of accident.
Engineer Huxoll was going down to his engine and stopped on main line when engine struck him

12. A. Was person injured while making coupling or uncoupling? Who examined coupling apparatus, and was it in good order?
No

B. State kind of draw-bars. Were draw-heads of equal height?

13. Give initials and numbers of engines and cars immediately connected with this injury, and condition of same. If in bad order, were they so marked?
U. P. Engine, 213

14. A. Was there any defect in track, bridges, building, rolling stock, machinery, tools or other appliances, that caused, or may have assisted in causing the injury? If so, state fully.
No.

B. If there was a defect, how long had same existed? Had same been reported? If so, when, by whom, and to whom?

(Sign here) *Charles B. Mathews*

(Occupation) *Loco' Fireman*

(Address) *Sidney, Nebr.*

(Dated) _____ Month. Day of Month, 190

Dept. No. _____

Name *Fred Huxoll*

Address *North Platte*

Nebr.

Occupation *Loco' Engineer*

Date of Accident *Jan. 1st, 1911*

Place (Sta. or M. P.) *Sidney*

Exhibit No. 5. Calvin A. Emery,
Court Reporter, Lincoln, Nebr.

Supt.'s No. _____

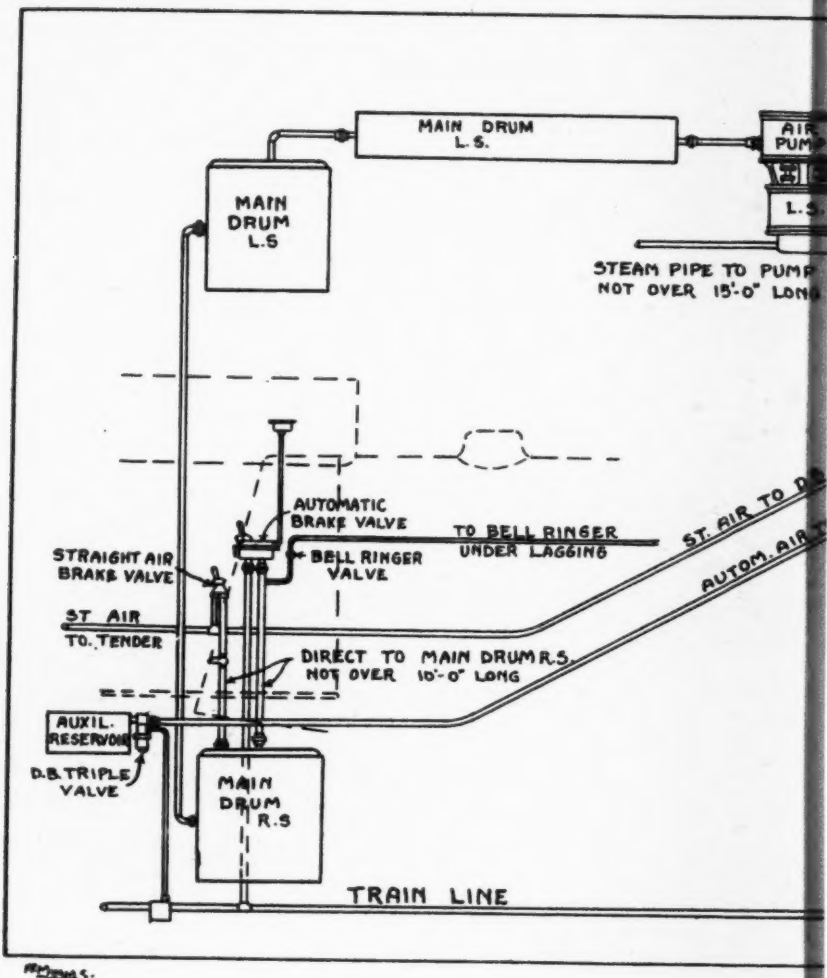
(Here follow photographs marked pages 799 and 800.)

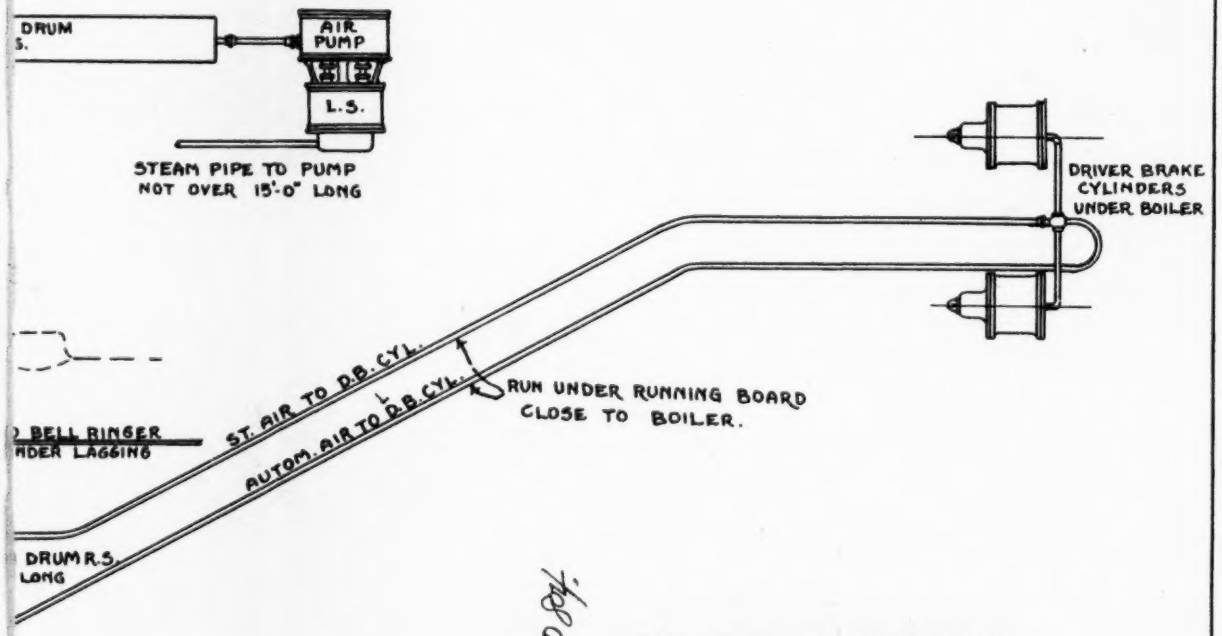
384
Union Pacific
R.R. Co.
v
Hurd

P. 799

384
Union Pacific
R.R. Co.
Harold
1880

3
384.
Union Pacific
R.R. Co.
v.
Hurlbut
p 803.
steam pipe furnishing steam for air pump.


MAIN DRUM L.S.
MAIN DRUM L.S
STEAM PIPE TO PUMP
NOT OVER 15'-0" LONG
AUTOMATIC BRAKE VALVE
TO BELL RINGER UNDER LAGGING
STRAIGHT AIR BRAKE VALVE
BELL RINGER VALVE
ST AIR TO TENDER
DIRECT TO MAIN DRUM R.S. NOT OVER 10'-0" LONG
AUXIL. RESERVOIR
D.B. TRIPLE VALVE
MAIN DRUM R.S
TRAIN LINE



AIR PIPING DIAGRAM

200 CLASS ENGS.

OFFICE MECH. ENGR
UNION PACIFIC RR
OMAHA NEB.
OCT. 16 1913.

SKETCH 1969
BOOK 1
REVISED

384
Union Pacific
RR Co.
vs.
Haskell
P. Ex.

Riggs was riding step on engine on south side. I was firing engine. I noticed this dense fog or smoke west of us. Our engine was running through this smoke or fog not to exceed 3 or 4 miles an hour. An engine was standing at water crane as we passed. All of a sudden our engine came to a stop. I was north side of engine and I looked out to see what was wrong. I did not know what was wrong but engineer said he thought we had killed some one. I got down off our engine on north side and saw man lying between drivers of our engine—with his arm under Driver #3 on north side—I went back up in engine. When Engine 213 stopped the pilots of it and Eng. 1913 were just about opposite each other—judging from evidences on rail and in the snow between the rails of main line I would say Huxall was struck about 15 feet west of

Dated Jan. 2nd, 1911. 2.

Form 3572-2.

Sheet No. 3. P. I. Fred W. Huxall.

Statement of Chas B. Mathews.

water crane—and when taken out from under our engine Huxall was from 60 to 75 feet west of water crane. The bell on our engine was ringing while passing through this fog—same was operated by Automatic Bell ringer. Parties jacked our engine up to get Huxall out—I did not see him after he was taken out from under our engine. This accident occurred Jan. 1st, 1911, about 11 A. M. I did not see Huxall or Dupont walking toward our engine prior to accident—I was on my side of engine and firing same all the way from time we pulled out on main line until time of accident. I was on north side of engine. After our engine was stopped some one stepped up in gang way on my side and wanted me to move engine backward—I told him I would not do it. I heard no one prior to our stopping get up on my side of engine and hallow to Zimmer Engineer to stop as he had run over somebody.

The above statement is true and correct.

CHARLES B. MATHEWS.

L. E. JOHNSTON, *Witness.*

Dated Jan. 2nd, 1911. 3.
Taken at N. P. Hotel, Sidney, Neb.

(Here follows fac-similes and photographs, marked pages, 798 to 804.)

805 (Exhibit 15 attached to this sheet.)

Ex. A--1.

Exhibit A. 5/10/13. P. R. S.

Exhibit No. 15. Calvin A. Emery, Court Reporter, Lincoln, Nebr., Second Trial.

KANSAS CITY, MO., July 12, 1912.

My name is Paul J. Dupont. I am now living at Slater, Missouri. I can always be located by addressing Mrs. N. W. Dulaney, Stewartsville, Mo., who is my sister. I am 22 years old and am now an employee of the Chicago and Alton Railway in the capacity of brakeman. I remember the accident, which resulted in the death of Fred Huxoll, that happened on or about January first, nineteen hundred and eleven, near the water tank in the roundhouse yards of the Union Pacific Railway, at Sidney, Nebraska. This accident happened about 11:15 A. M. of January 1, 1911. At this time there was a high wind, ladened with snow, coming from the northwest and blowing to the southeast. The ground was covered with about a two inch layer of snow and for about ten feet all around the water crane there was a slick layer — ice. This northwest wind blew the smoke and steam from the smoke stacks and steam pipes of the roundhouse so that the smoke and steam lay so close to the ground that it formed a fog, so that I was not able to see more than 12 or 15 feet a head of me, although I could see back of me farther than that. At this time Fred Huxoll was about ten feet behind me. The above mentioned roundhouse is about 35 yards northwest of the water crane.

About an hour previous to this accident I was called for a freight train to go east to North Platte, Neb. I was called as fireman for this run, and Fred Huxoll the deceased was to be my engineer on this trip. I had been in the service of the Union Pacific for about eight months, as fireman, at the time of this accident. Just a few moments prior to this accident the deceased Fred Huxoll and myself started from the wash room, a small building about 15 or 20 yards west of the above mentioned roundhouse and started out in a southeasterly direction, passing along side the turn-table at the roundhouse and continuing in a southeasterly direction toward our engine which stood facing east on the outbound track about ten yards east of the aforesaid water crane. This outbound track extending from the water crane to its eastern extremity was parallel with the main line track running east and west, but this outbound track extending west from the water crane diverged to the northwest to the northwest extremity at the turn table. The deceased and myself continued in this southe-sterly direction until we neared the main track at a point about ten yards west from the above mentioned water crane. At this point, with Fred Huxoll about ten feet behind me, we began walking in an eastererly direction toward our

COPY BOUND CLO

engine, and parallel with the main line track. I did not see Fred Huxoll step in between the rails on the main line track, but in turning around looking for Huxoll I saw him walking up the track between the rails. At this time I was about ten feet north of the main line track and walking east to my engine, I being about thirty feet west of the water crane at this time, walking east toward the water crane, when I had advanced about ten feet from this last described point I heard the rumble and panting of an engine, but could not tell in which direction it was coming from, or upon what track, but I immediately turned toward the deceased Fred Huxoll, still continuing my walk east, and hollowed to Fred Huxoll—"Get out of the track Fred, as I hear something coming." I had not advanced more than five feet from the place where I first heard the noise of the approaching engine until it struck and knocked out of my hand my hand bag, which I was carrying in my right hand. Just at this instant I turned around toward Huxoll and saw this same engine strike and knock down Fred Huxoll. Fred Huxoll at the same time attempting to get out of the track toward the north. The engine which knocked down and ran over Fred Huxoll was number two-hundred-thirteen, belonging to the Union Pacific. It was being used as a switch engine—this engine being of the type known as a road engine. This engine 213 was backing up and was on the main line, west bound. At the time it struck my grip and the deceased Fred Huxoll this engine was going fully twelve or fifteen miles per hour, to the best of my judgment. This engine had a high tank used on the regular road type of coal burners, and there were no steps for switchmen on the rear end of this engine's tank, and there was no switchmen or any other person riding the rear end of this engine tank which was the end that struck Huxoll, as this engine was backing up. As the tank hit Huxoll I immediately jumped on the step at the cab of the engine, on the fireman's side, of engine 213, and hollowed at the engineer and told him to stop at once as he had run over my engineer. He did stop in about an engine's length or a little farther, and upon stopping engine 213 the engineer and fireman of that engine whose names I know not, and myself all got down and found Huxoll lying underneath the engine, between #1 and #2 drivers, the brake, riggings and wheels having caught him. He showed signs of having been dragged by the ash pan and brake riggings. Huxoll must have been dragged twenty five or thirty feet by engine 213. I did not see any switchmen or or about this engine 213 at any time of this accident. This engine had no cars attached to it and no one in charge of it but the engineer and fireman. This engine 213 gave out no warnings in the way of a whistle or ringing of the bell—although there was a bell ringing I do not know for sure on what engine it was—it might have been on one of the engines on the outbound track. The engineer did not shut off his engine until I notified him of the accident—Huxoll having been hit and knocked under the engine at this time.

The route Huxoll and I used in approaching our engine was the usual way, although it was possible for us to have gone on the north

side of the turntable and gone on between the water crane and coal chutes, but this way was as dangerous, if not more so than the regular and usual route which we were using.

I have read the above statement on seven pages, and it is true and correct as to the best of my recollection and belief.

PAUL J. DUPONT.

Witness.
MONTIE T. PREWITT.

806 (Exhibit 16 attached to this sheet.)

EXHIBIT No. 16.

Calvin A. Emery, Court Reporter, Loncoln, Nebr., 2nd Trial.

Union Pacific Railroad Company.

Statement of wages earned by Fred W. Huxall During the Years 1908, 1909, *and* 1910, *by Months.*

January	1908	$67.01
February	"	100.76
March	"	111.13
April	"	115.22
May	"	122.32
June	"	107.02
July	"	107.02
August	"	100.43
September	"	100.50
October	"	123.17
November	"	114.27
December	"	74.62
January	1909	92.25
February	"	90.65
March	"	94.71
April	"	94.71
May	"	99.98
June	"	102.93
July	"	105.40
August	"	121.73
September	"	150.10
October	"	159.23
November	"	107.05
December	"	105.15
January	1910	165.00
February	"	94.00
March	"	141.47
April	"	173.60
May	"	112.05
June	"	120.73

WESTBOUND

TRAIN REGISTER

Conductors must be particular to state

TRAIN AND DIRECTION OF EXTRAS	CLASSIFICATION SIGNALS FROM AND TO	ARRIVED	DEPARTED
53	No sigs	240 a	
5	No sigs	655 a	
3	none	7 45 a	
Ex west	White	905 a	
Ex west	White sigs	135 pm	
19	none	557 pm	
9	none	602 p	
1	no sigs	705 p	
55	no sigs	835p	
61	no sigs	10 ^{00} p	
7	no sigs	10 ^{18} p	
17	no sigs	1133pm	
Cover &	Crew Dead Head	in on No.	17

Form 2361—Small.

EXHIBIT 15.

DO NOT PUT TWO DAYS' TRAINS ON SAME PAGE.

C. S.

C. S.

Dec. 30 1910

Under heads "Arrived" "Departed," and "Compared Time" whether A. M. or P. M.

ENGINE No.	ENGINEER	CONDUCTOR	CARS IN TRAIN			HANDLED ON TRIP			COMPARED TIME	
			Loads	Empties	Tons	Loads	Empties	Tons	Conductor	Engineer
312	Guyman	L. Tarkington	19	17	1330	same			Cab 2314	
114	Eshleman	J. Snyder	12							
1696	Hinman	Lawerance	11							
353	Vosepka	Culton	31	1	1087	same			Cab 2020	
315	Murrin	Murdock	33	7	1445	34	8	1480	cab 2331	
20	Congdon	Hubbard	5							
16	Fenwick	Hastings	4							
21	Stuart	Rork	6							
313	Kelly	Garrison	40		1529	same			Cab 2214	
1699	Repley	Mitchell	6	7	250	10	27	717	2105	
18	Thompson.	Jeter	6							
1822	Flynn	Holcomb	7							

WESTBOUND

TRAIN REGISTE

Conductors must be partic

TRAIN AND DIRECTION OF EXTRAS	CLASSIFICATION SIGNALS FROM AND TO	ARRIVED	DEP
Ex west	White sigs	715 a	
5	No sigs	744 a	
3	No sigs	758 a	
Ex west	White sigs	10 am	
19	No sigs	557 pm	
9	No sigs	647 p	
1	None	7 pm	
55	No signals	725 pm	
Ex west	White sigs	730 pm	
Ex west	White	945 pm	
7	No sigs	1038 p	
17 of 31st	No sigs	1214 am	

Form 3661—Small.

EXHIBIT 16

DO NOT PUT TWO DAYS' TRAINS ON SAME PAGE.

C. S.

EGISTER Dec 31st 191 0

must be particular to state under heads "Arrived" "Departed," and "Compared Time" whether A. M. or P. M.

2-11-1,000 S&S

ED	DEPARTED	ENGINE No.	ENGINEER	CONDUCTOR	CARS IN TRAIN			HANDLED ON TRIP			COMPARED TIME		
					Loads	Empties	Tons	Loads	Empties	Tons	Conductor	Engineer	
		1920	Hogg										
a		1913	Trexler	Yates	42	12	1820						
a		113	Murphy	Seibert	12								
a		1905	G D C	Doram	12								
am		1909	Hinckle	C.E.Vernon	36	1	1127	same			Cab 2168		
pm		20	Bird	Gilfoyl	6								
p		16	Tracy	Mooney	5								
pm		21	Morris	Anderson	6								
pm		354	Orton	Leon	40		1416	same					
pm		1907	Moody	Howard	Lite								
pm		1698	Huxell	Fletcher	Wrecker								
p		18	Strahorn	Williams	6								
am		114	Smith	Mecomber	7								

WESTBOUND

TRAIN REGISTER

Conductors must be particular to state

	TRAIN AND DIRECTION OF EXTRAS	CLASSIFICATION SIGNALS FROM AND TO	ARRIVED	DEPARTED
	5	No sigs	620 a	
	3	No sigs	815 a	
		O'Connell & crew Dead Head in on		
	Ex west	White sigs	10 am	
		Huddart and crew D H on Ex 314		
60		H LeDoyt and crew D H on Ex 314		
	Ex west	White sigs	1030 am	
	Leon &	crew D H on Ex 314		
	Ex west	White	1050 am	
	Ex west	White	620 p	
	19	None	1033 pm	
	9	None	1040 p	
	1	None	1143 p	

Form 2561—Small

EXHIBIT 17

☞DO NOT PUT TWO DAYS' TRAINS ON SAME PAGE.☜

C. S.

REGISTER Janv 1st 1911 1911

ors must be particular to state under heads "Arrived" "Departed," and "Compared Time" whether A. M. or P. M.

RIVED	DEPARTED	ENGINE No.	ENGINEER	CONDUCTOR	CARS IN TRAIN			HANDLED ON TRIP			COMPARED TIME	
					Loads	Empties	Tons	Loads	Empties	Tons	Conductor	Engineer
0 a		110	Eshleman	Weir	7							
5 a		1696	Murrin	J Snyder	10							
Dead Head in on		X 351	west Rest up at 9 am		Cab 2128							
0 am		351	Bowersox	Cover	16	12	1081	same				
D H on	Ex 314											
D H on	Ex 314											
30 am		311 314	Hinckle Trexler	C.E.Vernon	30	5	1680	31	5	1712		
50 am		315	W.B.Brown	Bailor				38		1345		
20 p		1913 1909	Army Hinkle	Fletcher	38		1345	same			cab 2369	
33 pm		20	Salcette	Lawrence	6							
10 p		16	Fenwick	Hubbard	4							
3 p		21	Seigert	O'Brien	6							

☞DO NOT PUT TWO DAYS' TRAINS ON SAME PAGE.☜

TRAIN REGISTER

Conductors must be particular to state

	TRAIN AND DIRECTION OF EXTRAS	CLASSIFICATION SIGNALS FROM AND TO	ARRIVED	DEPARTED
	54	no sigs		413 a
	6	no sigs		408 a
	20	no sigs		5 a
	10	none		
	Ex East	White		
	18	none		835
	8	none		910
	62	no sigs		815
	2	no sigs		1256
			Yates &	Crew dead
	56	no sigs		
	4	no sigs	508 p	513

Form 2561—Small.

Exhibit 18

EASTBOUND C. S.

TER Dec 31st. 1910

articular to state und-- heads "Arrived " "Departed," and "Compared Time" whether A. M. or P. M.

DEPARTED	ENGINE No.	ENGINEER	CONDUCTOR	CARS IN TRAIN			HANDLED ON TRIP			COMPARED TIME		
				Loads	Empties	Tons	Loads	Empties	Tons	Conductor	Engineer	
413 a	315	Murrin	Murdock	42	7					235am	245a	
408 a	20	Congdon	Weir	3 B	2 c	1 t	1 s			405a	324a	
5 a	16	Fenwick	J. Snyder	7						455a	345a	
	21	Stuart	Lawrence	9							425a	
	313	Kelly	Gerrison	37	15					630 a	615 a	
835	18	Thompson	Hubbard	1 m	1 B	2 c	1 t	1 D	2 s 1	obs	710 a	
910	1822	Flynn	Hastings	1 B	1 t	1 D 2	a 1	obs			750 a	
815	1699	Reppey	Mitchell	24	8					630 a	830a	
1256	113	Murphy	Rork	1 B	1 m	1 D	3 s	1 obs			1215p	
rew dead	head	on No 56								115 p	125 p	
	1920	Bowersox	Cover									
513	1905	G D C	Jeter	1 m	2 B	2 c	1 D	1 s			320 pm	

☞DO NOT PUT TWO DAYS' TRAINS ON SAME PAGE.☜

TRAIN REGISTER

Conductors must be particular to state und

	TRAIN AND DIRECTION OF EXTRAS	CLASSIFICATION SIGNALS FROM AND TO	ARRIVED	DEPARTED	ENG
	6	No sigs	646	653	2(
	20	No sigs	730	738	1(
	10	No sigs	814	835	2
	8	No sigs	1050	11 K	4
55	(Ex East	White			19
					19
	18	No sigs	1227	1135 p	1
	2	None	127	135 p	1
	4	No sigs	512		15
	54	No sigs			3
	(Note - Name Armstrong evidently written				

Form 2561—Small.

EXHIBIT 19

EASTBOUND

TER Jan 1st 1911

rticular to state under heads "Arrived" "Departed," and "Compared Time" whether A. M. or P. M.

DEPARTED	ENGINE No.	ENGINEER	CONDUCTOR	CARS IN TRAIN			HANDLED ON TRIP			COMPARED TIME	
				Loads	Empties	Tons	Loads	Empties	Tons	Conductor	Engineer
				B	C	T	S				
653	20	Bird	Holcomb	2	2	1	1				527 a
				B	M						
738	16	Tracy	Seibert	2	4					731 a	6 a
		Trexler	C.E. Vernon	Fead Head No. 6							602 a
835	21	Morris	Dorram	1 B	2 C	2 T	1 D	2 S			610 a
11 K	18	Strahorn	Gilfoyl	1 B	1 T	1 D	2 S	1 obs		1049 a	915 a
	1913	(See note) Armstong	Fletcher							1107 a	1019 a
	1909	Hinkle		Light							1020 a
135 p	114	Smith	Mooney	1 M	1 B	2 C	1 T	1 D	1 S	1 obs	1100
135 p	110	Eshleman	Anderson	1 B	1 M	1 D	3 S	1 obs			1205 p
	1696	Murrin	Williams	1 m	1 B	C 2	f D	1 S			435 p
	314	Yates	O'Connell	23						1140 p	11 pm
written after something had been erased.)											

July	"	138.43
August	"	176.25
September	"	170.99
October	"	100.90
November	"	133.45
December	"	177.55
Total		.....

STATE OF NEBRASKA,
Douglas County, ss:

C. T. Cullen being first sworn deposes and says that the above statement shows the amounts paid by Union Pacific R. R. Co., to Fred W. Huxall during years 1908, 1909 and 1910 as shown by records now in my office; that my position is Pay Clerk for Union Pacific R. R. Co., at Omaha.

C. T. CULLEN.

Subscribed and sworn to before me this 18th day of October 1913.

[Notarial Seal H. M. Engelman, Douglas County, Nebraska.]

H. M. ENGELMAN,
Notary Public.

Commission Expires Nov. 13, 1918.

(Here follows Exhibits 15 to 19, marked page 807.)

808 In the District Court of Lancaster County, Nebraska.

ELLA HUXOLL, Adm'x, etc., Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

And the Defendant, in the above entitled cause, in the d trict court of Lancaster County, third judicial district of Nebras having within the time heretofore allowed by the court for that p pose, reduced to writing, in this its bill of exceptions, consisting Two Volumes of which this is Volume Two, all of the testimo and evidence adduced or offered on both sides of the before nam cause, in the before named court, all of the objections, with grounds therefor, made to the admission of testimony and evide all of the rulings of court on such objections, and all of the excepti to such rulings made and taken at the time, and having served same on the attorneys for the above named Plaintiff, according law, for examination and amendment; and the said bill of ex tions being now here before me the undersigned judge, before wh said cause was tried, on motion of the attorneys for the Defend that the same may be settled, allowed, signed, sealed, and mad part of the record in said cause in the said court.

Now I, the said judge, do hereby certify that this bill of ex tions contains all of the testimony and evidence adduced or offe by the plaintiff and defendant on the trial of said cause, all of objections to the admission of testimony, all of the rulings of court on such objections, and all of the exceptions take

809 such rulings at the time, and I do hereby order that it made a part of the said record in the said cause in the court.

With Bill amended as requested by plaintiff.

Done at Lincoln, Nebraska, this 20th day of March, 1914.

P. JAS. COSGRAVE, *Judge*

810 I, Calvin A. Emery, one of the stenographic reporters and for the third judicial district of Nebraska, hereby cer that the above and foregoing is a true transcript and bill of ex tions of the evidence offered and given by the respective parties the trial of the above entitled cause, together with all objection the said parties, the rulings of the court thereon, and the excepti of the said parties thereto, according to my skill. And that the bill of exceptions is contained in two volumes, of which this is volu two.

CALVIN A. EMERY, *Reporter*

Fees for Bill of Exceptions, $286.30.
Paid by U. P. R. R. Co.
Date, 3/20/14.
C. A. EMERY, *Reporter.*

811 January 23, 1914.

This bill of exceptions was delivered to Mr. E. C. Strode, Attorney for the defendant in the case of Huxoll vs. the Union Pacific Railroad, on the 19th of January, 1914. On the 20th day of January Mr. Strode received the Rules of the Supreme Court of the state of Nebraska in force February 1, 1914. Mr. Strode called my attention to changes which were made in the manner of preparing bills of exceptions. Inasmuch as this bill of exceptions was already bound and delivered prior to February 1st, although not filed in the Supreme Court, I called upon Mr. Lindsley, Clerk of the Supreme Court for the purpose of ascertaining whether or not it would be necessary to take this bill of exceptions apart and make the marginal notations as provided in the new rules. Mr. Lindsley assured me that under the circumstances he was of the opinion that such an action was wholly unnecessary.

For this reason I am attaching this notation, in order that when this bill is filed in the Supreme Court the circumstances will be understood.

CALVIN A. EMERY, *Reporter.*

812 Endorsed: Clerk's Office District Court, Lancaster County, Nebraska. Filed Mar. 20, 1914. J. S. Baer, Clerk Dist. Court.

Endorsed: 18377. Huxoll v. U. P. R. Co. Bill of exceptions. Volume 11. Supreme Court of Nebraska. Filed Aug. 7, 1914. H. C. Lindsay, Clerk.

813 And afterwards, to-wit, on the 20th day of February, 1915, there was filed in the office of the clerk of said supreme court a certain stipulation, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

ELLA HUXOLL, Administratrix, et al., Plaintiff, Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant, Appellant.

Stipulation.

It is stipulated and agreed that the defendant, the Union Pacific Railroad Company may have until May 3rd, 1915, within which to prepare and serve its brief on appeal and that the Appellee, Ella Huxoll, et al., shall have 120 days thereafter within which to prepare and serve answer brief.

Dated this 3rd day of February, 1915.

W. V. HOAGLAND,
HALLECK F. ROSE &
COMSTOCK,
Attorneys for Appellee.
EDSON RICH,
B. W. SCANDRETT, AND
E. C. STRODE,
Attorneys for Appellant.

Endorsed: 18377. In the Supreme Court of Nebraska. Ella Hu
oll, Administratrix, Plaintiff-Appellee, vs. Union Pacific R. R. C
Defendant-Appellant. Stipulation in re briefs. Supreme Court
Nebraska. Filed Feb. 20, 1915. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 26th day of February, 1915, th
was rendered by said supreme court and entered of record upon t
journal thereof, a certain order in the words and figures followi
to-wit:

814 Supreme Court of Nebraska, January Term, A. D. 19

No. 18377.

Feb. 26

ELLA HUXOLL, Adm'x, Appellee,
v.
UNION PACIFIC R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon stipulation of parties
an extension of time within which to file briefs herein, was s
mitted to the court; upon due consideration whereof, it is by
court ordered that said stipulation be, and the same hereby is,
lowed; that appellant be, and hereby is, given until May 3, 1915,
serve and file briefs, and appellee is given until September 3, 19
to serve and file answer briefs.

A. M. MORRISSEY,
Chief Justice

And afterwards, to-wit, on the 29th day of April, 1915, th
was filed in the office of the clerk of said supreme court a cert
Stipulation, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

ELLA HUXOLL, Administrator, et al., Plaintiff, Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant, Appellee.

Stipulation.

It is stipulated and agreed that the defendant, the Union Pa
Railroad Company may have until June 1st, 1915, within wh

to prepare and serve its brief on appeal and that the Appel-
815 lee, Ella Huxoll, et al., shall have until September 1st, 1915, within which to prepare and serve answer brief.

Dated this 19th day of April, 1915.

W. V. HOAGLAND,
HALLECK F. ROSE,
WILMER B. COMSTOCK,
Attorneys for Appellee.
EDSON RICH,
B. F. SCANDRETT,
E. C. STRODE,
Attorneys for Appellant.

Endorsed: Supreme Court of the State of Nebraska. 18377. Ella Huxoll, administrator, et al., Plaintiff, Appellee, vs. Union Pacific Railroad Company, Defendant, Appellant. Stipulation. Supreme Court of Nebraska. Filed Apr. 29, 1915. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 1st day of May, 1915, there was rendered by said supreme court and entered of record upon the journal thereof, a certain order in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1915.

No. 18377.

May 1.

ELLA HUXOLL, Adm'x, Appellee,
v.
UNION PACIFIC R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon stipulation of parties for an extension of time within which to serve and file briefs, was submitted to the court; upon due consideration whereof, it is by the court ordered that said stipulation be, and the same hereby is, allowed; that appellant be, and hereby is, given until June 1,
816 1915, to serve and file briefs herein, and appellee given until September 1, 1915, to serve and file answer briefs.

A. M. MORRISSEY,
Chief Justice.

817 And afterwards, to-wit, on the 1st day of June, 1915, there was filed in the office of the clerk of said supreme court by said appellant, the Union Pacific Railroad Company, fifteen printed briefs as required by the rules of said court, which briefs contain, among other things, the Assignments of Error made by said appel-

lant. The said Assignments of Error as the same appear in s
briefs are in the words and figures as follows:

818 I.

The court erred in submitting instructions numbers one and th
wherein the court instructed the jury as to the allegations of ne
gence set out in plaintiff's petition, including certain specific acts
negligence with respect to which no evidence had been offered; a
in instruction number three instructed the jury that these pleadi
made up the issues which they were to try and determine by th
verdict.

In instruction No. 1, the court instructed the jury that it
alleged in the plaintiff's petition:

1. "That defendant negligently located and constructed
roundhouse in close proximity to its said main line track.

2. "And on January 1, 1911, was negligently maintaining
operating the same as aforesaid so that the smoke and steam
veloped and obscured its engines and cars passing over said m
line track.

3. "That defendant negligently permitted said water crane
become out of repair and water to fall from which ice accumula
in the vicinity of said water crane, rendering the way slippery
dangerous.

4. "And defendant negligently permitted dark clouds of sm
and steam to escape from said round house so negligently loca
near the water crane and engine tracks adjacent thereto.

5. "Defendant negligently and carelessly and without warn
backed an ordinary road locomotive engine which it was carele
and negligently using as a switch engine upon and over the
Fred J. Huxoll.

6. "That said engine so backed up at a high and wide water t
which obstructed the view of the engineer.

7. "And had no foot board or running board on either end
side of the engine while the commonly used switch engine- h
narrow and retreating or sloping water tank and have
819 are constructed with running boards on both ends of
engine where switchmen are stationed for a lookout;
defendant failed to comply with the common and general prac
required in the Sidney yards by failing to have said foot boards
said road engines used for switching purposes, and have a swi
man or brakeman thereon as a lookout.

8. "And that defendant at the time of running down said
ceased said road engine so used for switching purposes at a needle
high and dangerous rate of speed.

9. "Without any brake or any applicance with which to
the same, the brake thereon being broken, defective and ou
repair.

10. "Without any bell or other device to give warning of the
proach thereof, the bell on said engine being broken, defective
out of repair.

11. "With the curtain or blind covering the window of the cab of said engine so as to prevent the engineer and fireman in charge of said engine from seeing persons or objects in front thereof.

12. "Alleging further the safety of defendant's employees working in said yards required that each engine be so operated as to be able to stop within the distance the track is actually seen to be clear.

13. "In common and general practice during foggy and stormy weather, and at points where the track is obscured by smoke and steam, extra precautions are required and taken.

14. "Alleging that the road engine crew negligently and carelessly failed to keep the said road engine under control but to the contrary negligently operated the same at a high rate of speed and that it could not and was not stopped within the distance the track ahead could be seen to be clear."

II.

The court erred in refusing to give instruction number seven requested by the defendant, which is as follows:

820 "You are instructed that there is no evidence in this case tending to show that the defendant was negligent in locating its round house at the point where it was located on January 1st, 1911, and that that charge of negligence contained in plaintiff's petition is withdrawn from your consideration."

III.

The court erred in refusing to give instruction number eight requested by the defendant, which was as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant was negligent in permitting clouds of smoke and steam to escape from its roundhouse at Sidney on January 1st, 1911, and that that charge of negligence contained in the plaintiff's petition is withdrawn from your consideration."

IV.

The court erred in giving instruction number fifteen upon its own motion, which was as follows:

"The distance from the main line track at which the round houses of the defendant were located, the elevation of the ground beyond the round houses, the tendency of smoke from the round houses to collect about the tracks, and the presence of ice, to some extent, at least, in the vicinity of the water crane, together with the conditions of the weather, as shown by the evidence, are proper subjects of consideration in determining whether the acts of the defendant's servants, on the one hand and of the deceased, on the other, were such as persons of ordinary care and prudence would have done at the time and under the conditions surrounding the casualty in question; but the incidents just referred to are not, in and of themselves, causes or grounds of negligence upon which a recovery in favor of plaintiff can be had."

V.

The court erred in refusing to give instruction number
821 nine requested by defendant, which is as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant had negligently permitted the water crane referred to in the plaintiff's petition to become so out of repair that it permitted the escape of water on the ground, and that that charge of negligence contained in plaintiff's petition is withdrawn from your consideration."

VI.

The court erred in refusing to give instruction number ten requested by the defendant, which was as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant had negligently permitted an accumulation of ice about and in the vicinity of the water crane referred to in plaintiff's petition and that that charge of negligence contained in said petition is withdrawn from your consideration."

VII.

The court erred in refusing to give instruction number twelve requested by the defendant, as follows:

"Even if you should find and believe from the evidence that some ice had been permitted to accumulate around the water crane involved in this case, still you could not find a verdict against the defendant because it had permitted said ice to accumulate as no evidence has been introduced in this case, tending to show that Fred Huxoll's death was caused in whole or in part by the fact that said ice has been permitted to accumulate."

VIII.

The court erred in refusing to give instruction number fifteen, requested by the defendants, which was as follows:

"You are instructed that you can not find a verdict against the defendant on the ground that engine 213 was being negligently operated at a high and dangerous rate of speed at the time
822 that it struck the deceased Fred Huxoll, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the operation of said engine at a high and dangerous rate of speed, even though you should find that said engine was in fact being operated at a high and dangerous rate of speed."

IX.

The court erred in refusing to give instruction number forty-four, requested by the defendants, which was as follows:

"You are instructed that the fact that steam and smoke were owing across the main track in the Sidney yards on January 1st, 11, immediately prior to and at the time of the accident as to secure the view of any one who might be operating an engine along e main line past water crane, was open and obvious and under e evidence in this case was known by the deceased Fred Huxoll d that said deceased assumed the risk of working in and about d steam and that you can not base a verdict against the defendant this case on the ground that it was negligent in permitting said oke and steam to escape and obscure the view."

X.

The court erred in refusing to give instruction number twenty-r, requested by the defendants, which was as follows:
"You are instructed that defendant company has and had at the ne of the accident the right to determine the style and build of tenders to be attached to its engines at any and all places and its ployees assumed all risk of injury from the usual and ordinary eration thereof."

XI.

The court erred in refusing to give instruction number eleven, requested by the defendant, which was as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant was negligent in using gine 213 in the switching service at Sidney on January 1st, 1911, tead of an engine of another type and that charge of negligence ntained in the plaintiff's petition is withdrawn from your con-eration."

XII.

The court erred in refusing to give instruction number thirty, quested by the defendant, which was as follows:
"You are instructed that the evidence in this case shows that the ceased, Fred Huxoll, was guilty of contributory negligence in ng upon the main track, and that the act of congress under ich this suit is brought provides that the damages suffered by widow and children shall be diminished by the jury in pro-rtion to the amount of such contributory negligence as compared h the negligence of the defendant, if any. In other words, if u should find and believe from the evidence that your verdict ould be for the plaintiff you should first determine what amount uld compensate the widow and children of such deceased for such ath, taking into consideration such elements as you are told in ner instructions it is proper for you to consider, and then if you lieve that the negligence of said Fred Huxoll was as great as the gligence of the defendant, if any, and bore an equal part in pro-cing his death you should deduct from the amount which you d would compensate the widow and children one-half of that

amount and return the balance as your verdict in this case. If, o
the other hand you should find that such negligence of the decease
was not as great as that of the defendant, or was greater than tha
of the defendant you should deduct less than half or more than
half, depending on whether such negligence was greater or less.

824 XIII.

The court erred in refusing to give instruction number thirtee
given by the defendant, which was as follows:

"You are instructed that you can not find a verdict against th
defendant on the ground that it negligently used engine 213 i
the switching service on January 1st, 1911, instead of a differe
type of engine, for the reason that there is no evidence in this ca
tending to show that if a different type of engine had been us
Fred Huxoll could have seen said engine approaching or the em
ployees on said engine could have seen Fred Huxoll in time to ha
averted the accident, or that the death of Fred Huxoll was caus
in whole or in part by the failure of the defendant to use a differe
type of engine.

XIV.

The court erred in giving instruction number twenty-five, giv
on its own motion, which was as follows:

"The fact that road engine No. 213 was used by defendant
switching purposes at the time of the accident, is not in and
itself, negligence, and a recovery in plaintiff's favor can not be ba
upon the fact that such engine was so used. It is proper, howe
to take into consideration the type, form and equipment of said r
engine and any variance in its equipment from the class and t
of engine usually employed in the switching service, in determin
whether the acts of defendant's servants, on the one hand and
the deceased, on the other were such as persons of ordinary chara
and prudence would have done at the time and under the condit
surrounding the casualty in question."

XV.

The court erred in refusing to give instruction number fourt
requested by the defendant, which was as follows:

825 "You are instructed that there is no evidence in this
tending to show that there was a general custom in v
in the yards at Sidney, of having a switchman on the forward
of a switch engine for the purpose of keeping a lookout to warn
engineer and those upon the track of the presence of danger
that you can not find a verdict against the defendant on the gro
that such a custom did exist and was not being followed by
defendant at the time Huxoll received the injuries which result
his death."

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XVI.

The court erred in refusing to give instruction number twenty-two, requested by the defendant, which was as follows:

"You are instructed that habits or customs of employes, such as brakemen, switchmen or others, of riding on the foot-board of its engines and facing the direction in which the engine was moving, if any such habit or custom you believe from the evidence to have existed, would not be binding on the defendant so long as such habits were for their own convenience and were not required by the defendant company for the purpose of warning the employes or others from the track."

XVII.

The court erred in refusing to give instruction number twenty-three, requested by the defendant, which was as follows:

"You are instructed that an instance or illustration of riding for their own convenience would be the case of a switchman whose duty it was to throw a switch to enable the engine to pass to another track, and, who, to save himself the effort of walking or to save time, rode the engine to the switch. Another instance might be that a brakeman or switchman, one of whose duties was to couple the engine to the car or string of cars, and who for the purpose of saving his steps or time, rode the engine to the car to be coupled on to. In other words, before you find the defendant company negligent in failing to have an employee upon the front end of the engine (meaning thereby the end in the direction the engine was moving) you must first find that either by rule or custom of the defendant company such person must have been required to have been riding there for the express and known purpose among other things and other duties, of giving warning of the approach of the engine and of signaling the engineer of the presence of a person or other object upon the track over which the engine was passing. It is not enough to find the defendant negligent on this point that as suited their convenience, switchmen, brakemen, or other employee did ride on that part of the engine herein referred to, either as a matter of convenience for themselves, or as a matter of habit between themselves."

XVIII.

The court erred in giving instruction number thirteen, upon its own motion, which was as follows:

"Among the allegations of the petition are the averments that in defendant's switching operations and particularly in its yards at Sidney, the safety of its employes and servants in and about the yards and of those called there for any special services required a brakeman or servant to be stationed on the leading end of the head car or engine for the purpose of keeping a lookout and warning the engineer and those upon the track of the presence of danger by collision or otherwise in time to be able to stop the engine or cars

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before colliding with any servant within the yard and that in gen
eral and common practice a brakeman or servant was so statione
for that purpose. The petition charges that in the movement of th
engine which inflicted the fatal injuries complained of, no brak
man or other servant was placed at the rear or leading end of th
engine to keep a lookout ahead and that no foot board or other pla
of rest was provided on said engine for that purpose, as is provide
by locomotive engines in common use in the switching servic
827 and that the defendant negligently and carelessly failed
so station a servant to keep a lookout or to provide an engi
suitably equipped therefor. If you find from the evidence that
was the custom of the defendant railroad company, at that time,
have a man stationed on the foot board on the leading end of th
engine or cars as a lookout, and that the defendant was guilty
negligence in failing to so station a man as a lookout, and that th
death of Fred J. Huxoll resulted, in whole or in part, from suc
negligence, then the plaintiff would be enti-led to recover in th
action."

XIX.

The court erred in refusing to give instruction number forty-tw
requested by the defendant, which was as follows:

"You are instructed that the evidence fails to disclose any rule
the defendant company which required the presence of switchm
or other employees of the company upon the foot boards of th
engines of defendant company, facing the direction in which th
engine was moving, while operating in the yards of the defenda
company, for the purpose of either warning persons of the approa
of the engines, or for the purpose of signaling the engineer in char
of the engine operating in the yards of the presence of any pers
upon the track over which the engine was moving."

XX.

The court erred in refusing to give instruction number forty-s
requested by the defendant, which was as follows:

"You are instructed that the charge of negligence contained in th
plaintiff's petition to the effect that the defendant was negligent
failing to have a man on the foot board of engine 213 as lookout,
withdrawn from your consideration, for the reason that there is
evidence in this case tending to show that if a lookout had been
the forward end of the engine he could have seen Mr. Huxoll
time to have avoided the accident."

828 XXI.

The court erred in refusing to give instruction number forty-seve
requested by the defendant, which was as follows:

"You are instructed that you can not base a verdict against th
defendant in this case on the ground that it failed to have a looko
on the foot board of engine 213, for the reason that there is

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evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of the defendant to have a lookout so located on said engine."

XXII.

The court erred in refusing to give instruction number eighteen, requested by the defendant, which was as follows:

"You are instructed that you can not base a verdict against the defendant in this case on the ground that the employees in charge of engine 213 failed to give any warning of the approach of said engine to the place where said Fred Huxoll was *in* the track, for the reason that the undisputed evidence in his case shows that said employees in charge of said engine had no reason to expect said Fred Huxoll was on said track or that any other employee was on the track at that point."

XXIII.

The court erred in refusing to give instruction number twenty-one requested by the defendant, which was as follows:

"You are instructed that you can not base a verdict against the defendant in this case on the ground that the defendant gave no warning of the approach of said switch engine on the track or failed to take proper precautions to ascertain whether the track was clear at the point where the accident occur-ed, for the reason that said Fred Huxoll had no duties to perform on or about the track at that point and the employees in charge of the engine had no reason
829 to anticipate that said Fred Huxoll or any other employee would be on the track at that point."

XXIV.

The court erred in refusing to give instruction number three, requested by the defendant, which was as follows:

"You are instructed that the undisputed evidence in this case shows that Fred Huxoll's death was the direct result of his walking down the main line track into a cloud of steam that was so dense that he knew he could not see an engine, if one approached, in time to avoid being struck by it, and when he also knew that said steam would prevent his being seen by those in charge of any engine which might approach, and that your verdict must be for the defendant."

XXV.

The court erred in refusing to give instruction number four, requested by the defendant, which was as follows:

"You are instructed that Fred Huxoll was guilty of contributory negligence in walking down the main track through the steam when a safe way was open to him, and that such negligence on his part was the proximate cause of his death, and that your verdict must be for the defendant."

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XXVI.

The court erred in refusing to give instruction number five, requested by the defendant, which was as follows:

"You are instructed that the undisputed evidence in this case shows that the proximate cause of Fred Huxoll's death was his own negligence in walking down the main track through the steam when a safe way was open to him, and that if the Act of Congress under which this action is brought, should be construed so as to permit a recovery in this case, it would deprive this defendant of its property
without due process of law and be in conflict with the Four-
830 teenth Amendment to the Constitution of the United States."

XXVII.

The court erred in refusing to give instruction number sixteen, requested by the defendant, which was as follows:

"You are instructed that on October 16th, 1913, the plaintiff amended her petition by interlining immediately after the word 'speed' in the nineteenth line from the top of page five of her petition, the following words: 'Without any brake or other appliance with which to stop the same, the brakes thereon being then broken, defective and out of repair; without any bell or other device to give warning of the approach thereof, the bell on said engine being broken, defective and out of repair; with the curtain or blind covering window of cab, of the said engine so as to prevent the engineer and fireman in charge of said engine from seeing persons or objects in front thereof, and without ringing any bell or giving any other signal or warning.' In this connection you are further instructed that the Act of Congress under which this action is brought provides that no action shall be maintained unless commenced within two years from the cause of action accrued, and that by reason of that provision the plaintiff can not after the two years has been expired, make new and distinct charges of negligence against the defendant, you are therefore instructed that the charges of negligence contained in said amendment which was made on October 16th, 1913, are withdrawn from your consideration and that you can not base a verdict against the defendant on any of the charges of negligence included in the said amendment."

XXVIII.

The court erred in refusing to give instruction number seventeen, requested by the defendant, which was as follows:

"You are instructed that you can not base a verdict against the
defendant on the ground that the brakes on engine 213 were
831 out of repair, broken, or not in working order, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of engine 213 to stop sooner than it did after the engineer was given a signal to stop."

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XXIX.

The court erred in refusing to give instruction number six, requested by the defendant, which was as follows:

"You are instructed that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of the defendant to comply with any Act of Congress enacted for the safety of its employees."

XXX.

The court erred in refusing to give instruction number thirty-three, requested by the defendant, which was as follows:

"You are instructed that the rules of the defendant which have been introduced in evidence and which require the giving of signals on approaching crossings have no application to this case for the reason that the deceased was not on or near any crossing at the time he received the injuries which resulted in his death and that such rules are withdrawn from your consideration and should not be considered by you in any way in your deliberations."

XXXI.

The court erred in refusing to give instruction number thirty-five, requested by the defendant, which was as follows:

"You are instructed that the rule of the defendant which has been introduced in evidence and which requires enginemen to approach distant and home signals in foggy or stormy weather with great care and with their trains under control, has no application in this case for the reason that said rule does not apply in any way to a switch engine and for the further reason that engine 213 was not approaching a distant or home signal at the time — the accident, and that such rule is withdrawn from your consideration and should not be considered by you in any way in your deliberations."

XXXII.

The court erred in refusing to give instruction number thirty-eight, requested by the defendant, which was as follows:

"You are instructed that the rule of the defendant which has been introduced in evidence and which requires trains to approach all stations where the view is obscured at a rate of speed that will enable them to stop should an emergency arise, has no application in this case for the reason that such rule does not apply to switch engines and for the further reason that engine 213 was not approaching a station where the view was obscured at the time of the accident, and Fred Huxoll was not near any station at the time of the injury which he received and which resulted in his death."

XXXIII.

The court erred in refusing to give instruction number thirty-nine, requested by the defendant, which was as follows:

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"You are instructed that the rules of the defendant which have been introduced in evidence and which requires that whistles be sounded at all whistling posts, has no application to this case for the reason that there is no evidence in this case tending to show that switch engine 213 went by any whistling post near the point of the accident."

833 XXXIV.

The court erred in giving instruction number twelve on its own motion.

"The evidence shows, without dispute that the railroad of the defendant, of which the yard at Sidney, where the accident in question occurred is a part of a highway of interstate commerce, and that defendant's road engine No. 213, which collided with deceased, Fred J. Huxoll, was an engine which the defendant used in hauling interstate commerce. An Act of Congress required that such engines be equipped with a power driving wheel brake so that the engineer can control its speed without requiring the use of a common hand brake. The Act of Congress under which this suit is prosecuted, making carriers by railroads while engaged in interstate commerce responsible for injury or death to an employee resulting in whole or in part, from negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed or other equipment, provides, among other things that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence or to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe. If you find from the evidence that the death of Fred J. Huxoll resulted in whole or in part from the negligence of any of the officers, agents, or employes of the defendant, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed or other equipment, alleged or charged in the petition, and that

834 the power brake of defendant's road engine No. 213 was not at the time of the accident in working order and could not then be used by the engineer on such locomotive to control its speed, and the fact that such power brake was not in working order and could not be used by the engineer to control the speed of the engine, contributed to the death of Fred J. Huxoll can not be held either to have been guilty of contributory negligence or to have assumed the risks of his employment."

XXXV.

The court erred in giving instruction number thirteen on its own motion.

XXXVI.

The court erred in giving instruction number fourteen on its own motion, wherein the court again repeats and reiterates the

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allegations of the plaintiff's petition in charging certain specific acts of negligence against the defendant.

XXXVII.

The court erred in giving instruction number sixteen on its own motion.

"The law is that a servant by his contract or employment, assumes the ordinary risks and dangers incident to his employment but in this case the deceased, Fred J. Huxoll, can not be held to have assumed the risks of his employment if you find that the power driving wheel brake on defendant's engine No. 213 with which he collided, was not the time of the accident in working condition, and that fact contributed to his death. The ordinary risks and dangers of a servant's employment assumed by him as a matter of law do not include risks and dangers due to the latter's negligence unless such risks and dangers are actually known to the servant or are open and obvious."

XXXVIII.

The court erred in admitting in evidence over defendant's objection rule No. 18, with respect to headlights to the front and rear of yard engines by night.

XXXIX.

The court erred in admitting in evidence over defendant's objection rule No. 31 which provided that the engine bell must be rung on approaching every station, public road crossing at grade, tunnels and snow shed until they are passed, and the whistle must be sounded at all whistling posts.

XL.

The court erred in admitting in evidence over defendant's objection rule No. 91*a*, to the effect that trains must approach all stations where the view is obscure at a rate of speed which will enable them to stop should an emergency occur.

XLI.

The court erred in admitting in evidence over defendant's objection rule No. 93, which was to the effect that within yard limits the main line track may be used, protecting against first class trains, etc.

XLII.

The court erred in admitting in evidence over defendant's objection rule No. 105, which was to the effect that both conductors and engine men are responsible for the safety of their trains, etc.

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XLIII.

The court erred in admitting in evidence over defendant's objec-
tion rule No. 106, which was to the effect that in all cases of doubt
or uncertainty the safe course must be taken and no risks run.

XLIV.

The court erred in admitting in evidence over defendant's objec
tion rule No. 893, which was to the effect that during foggy o
stormy weather no attempt should be made to recover lost time.

XLV.

The court erred in admitting in evidence over defendant'
836 objection rule No. 98, which was to the effect that trains mus
approach the end of double tracks, junctions, railroad cross
ings and grades and drawbridges prepared to stop unless the switche
and signals are right.

XLVI.

The court erred in admitting in evidence over defendant's ob
jection rule No. 14, which was to the effect that should a train fai
to answer whistle signals, as provided in 14-K, the train displayin
the signals should stop at once, etc.

XLVII.

The court erred in admitting in evidence over defendant's obje
tion rule No. 304, which was to the effect that in foggy and storm
weather enginemen must approach both Distance and Home signa
with great care and have their trains under control.

XLIX.

The court erred in admitting in evidence over objection of th
def-ndant the testimony of R. B. Fletcher, conductor, with respe
to certain precautions taken by him subsequent to the accident r
sulting in the injuries to Huxoll, in passing through the steam an
smoke on the main line at or about the point where Huxoll w
injured.

L.

The court erred in admitting in evidence over defendant's obje
tion the testimony of Thomas Orton, and in permitting counsel f
the plaintiff to incorporate in his question the contents of a bulle
issued subsequent to the accident, resulting in the injuries to Huxo

LI.

The court erred in admitting in evidence over defendant's obje

tion the testimony of C. E. Finch with respect to conditions assumed which would affect the free operation of the air brakes.

LII.

837 The court erred in denying the application of the defendant for permission to take the deposition of the witness Mathews during the progress of the trial and the action of the court in respect thereto was an abuse of discretion.

LIII.

The court erred in overruling defendant's motion for a new trial for the reason that the verdict was not sustained by the evidence.

LIV.

The court erred in refusing to submit to the jury the special interrogatory submitted by the defendant which was as follows:

"Special interrogatory submitted by defendant.

"In the District Court of Lancaster County, Nebraska.

"Ella B. Huxoll, administratrix of the estate of Fred. J. Huxoll, deceased, plaintiff, vs. Union Pacific Railroad Company, defendant.

"1. If you find for the plaintiff then state what amount you deduct from the total damage on account of the contributory negligence if any of the deceased, Fred Huxoll. Ans. —."

LV.

The court erred in refusing to give instruction number one requested by the defendant, which reads as follows:

"You are instructed to return a verdict for the defendant."

LVI.

The court erred in overruling defendant's motion for a new trial.

838 And afterwards, to-wit, on the 27th day of August, 1915, there was filed in the office of the clerk of said supreme court a certain Stipulation, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

No. 18377.

ELLA HUXOLL, Administratrix, et al., Plaintiff, Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant, Appellant.

Stipulation.

It is stipulated and agreed that the plaintiffs, Ella Huxoll, et a may have until October first, 1915, within which to prepare a serve their answer brief herein.

Dated this 26th day of August, 1915.

HALLECK F. ROSE,
Attorney for Appellee.
EDSON RICH,
B. W. SCANDRETT,
Attorneys for Appellant.

Endorsed: No. 18377. In the Supreme Court of Nebraska. E Huxoll, administratrix, et al., Plaintiff, Appellee, vs. Union Pac Railroad Company, Defendant, Appellant. Stipulation. Supre Court of Nebraska. Filed Aug. 27, 1915. H. C. Lindsay, Cle

And afterwards, to-wit, on the 11th day of September, 1915, th was rendered by said supreme court and entered of record upon t journal thereof, a certain Order in the words and figures followi to-wit:

839 Supreme Court of Nebraska, January Term, A. D. 1915.
Sep. 11.

No. 18377.

ELLA HUXOLL, Adm'x, Appellee,
v.
UNION PACIFIC R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon stipulation of part in re briefs, was submitted to the court: upon due considerati whereof it is by the court ordered that said stipulation be, and t same hereby is, allowed, and appellee given until October 1, 19 to serve and file briefs herein.

A. M. MORRISSEY,
Chief Justice.

And afterwards, to-wit, on the 27th day of September, 1915, there was filed in the office of the clerk of said supreme court a certain Motion, with Notice and Proof of Service, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 18377.

ELLA HUXOLL, Administratrix of the Estate of FRED J. HUXOLL, Deceased, Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY, Appellant.

Appeal from District Court of Lancaster County, Nebr.

Motion for Leave to File Additional Transcript.

Appellee suggests to the court that certain of the assignments of error made and argued by appellant in its brief herein, are based on the rulings of the trial court recognizing as valid and presenting the issue that a violation by defendant of the Federal
840 Safety Appliance Act contributed to the death of Fred J. Huxoll, an amendment to plaintiff's petition filed November 6, 1912; that the following among other proceedings were had in the district court; a motion to strike certain words from said amendment was filed by defendant November 19, 1912, on leave of court first granted, and said motion was heard and denied by the Court on the 30th day of November, 1912, all within two years from the casualty for which the suit was brought; and that said proceedings are not embraced within the transcript of the proceedings filed herein by appellant.

Said facts are material to issues presented by the brief of appellant, and can only be shown by an additional transcript containing said proceedings, properly certified by the Clerk of the District Court.

Wherefore appellee moves the court for leave to file an additional transcript containing the proceedings aforesaid, certified as required by law, which she will present with this motion.

W. V. HOAGLAND,
W. B. COMSTOCK,
STOUT, ROSE & WELLS,
Attorneys for Appellee.

Notice.

The appellant, Union Pacific Railroad Company is notified that the above and foregoing motion will be filed in the above entitled case, and will be submitted to the court for determination at the opening of said court on the morning of November 1, 1915.

W. V. HOAGLAND,
W. B. COMSTOCK,
STOUT, ROSE & WELLS,
Attorneys for Appellee.

Received a copy of the within motion and notice this 25 day of September, 1915.

B. W. SCANDRETT,
Attorney for Appellant.

841 Endorsed: No. 18377. In the Supreme Court of the State of Nebraska. Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Decd., Appellee, vs. Union Pacific Railroad Company, Appellant. Motion for leave to file Addition-Transcript, and Notice. Supreme Court of Nebraska. Filed Sep. 27, 1915. H. C. Lindsay Clerk.

And afterwards, to-wit, on the 1st day of October, 1915, there was filed in the office of the clerk of said supreme court a certain Notice of Motion and Proof of Service, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 18377.

ELLA HUXOLL, Administratrix of the Estate of FRED J. HUXOLL, Deceased, Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellant.

Appeal from District Court of Lancaster County, Nebr.

Notice.

To the Appellant, Union Pacific Railroad Company:

The appellee hereby recalls her notice heretofore served upon you, fixing November 1, 1915, as the date of presentation of her motion for leave to file supplemental transcript herein, and she hereby notifies you that she will present said motion to the Supreme Court at Lincoln for determination upon the coming in of court Monday morning, October 18, 1915.

The occasion for changing the date of submitting the motion mentioned is that the case is on the proposed call for the week commencing October 18th.

STOUT, ROSE & WELLS,
Attorneys for Appellee.

842 Service of the above and foregoing notice accepted this — day of September, 1915.

B. W. SCANDRETT,
Attorneys for Appellant.

Endorsed: 18377. Huxoll v. Union Pacific R. Co. Notice & proof of service — on motion for leave to file supplemental transcript. Supreme Court of Nebraska. Filed Oct. 1 1915. H. C. Lindsay Clerk.

And afterwards, to-wit, on the 8th day of October, 1915, there was filed in the office of the clerk of said supreme court a certain Stipulation, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 18377.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellant.

Stipulation.

It is hereby stipulated, subject to approval of the court, that an order may be entered granting leave to appellee to file an additional transcript, properly certified by the Clerk of the District Court, showing matters specified in her motion for said leave heretofore filed herein.

E. C. STRODE,
B. W. SCANDRETT,
Attorneys for Appellant.
STOUT, ROSE & WELLS,
Attorneys for Appellee.

Endorsed: 18377. Huxoll v. Union P. R. Co. Stipulation in re filing transcript. Supreme Court of Nebraska. Filed Oct. 8 1915. H. C. Lindsay Clerk.

843 And on the same day, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1915. Oct. 8.

No. 18377.

ELLA HUXOLL, Adm'x, Appellee,
v.
UNION PACIFIC R. CO., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon stipulation of parties for leave to file additional transcript herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that said stipulation be, and the same hereby is, allowed and leave given to file additional transcript herein.

A. M. MORRISSEY,
Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a certain Additional Transcript, in the words and figures following, to-wit:

Motion for Leave to Amend Petition.

In the District Court of Lancaster County, Nebraska.

47-76.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll Deceased, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

844 Comes now the plaintiff and moves the court for leave to amend her petition filed in this court on the 23rd day of September, 1911, by interlining immediately after the word "speed" in the nineteenth line from the top of page 5 of said petition, the following words:

"Without any brake or other appliance with which to stop the same, the brake thereon being then broken, defective and out of repair, without any bell or other device to give warning of the approach thereof, the bell on said engine being broken, defective and out of repair, with the curtain or blind covering the window of the cab of said engine so as to prevent the engineer and fireman in charge of said engine seeing persons or objects in front thereof, and without ringing any bell or giving any other signal or warning."

W. V. HOAGLAND,
STOUT & ROSE, AND
W. B. COMSTOCK,
Attorneys for Plaintiff.

The defendant hereby acknowledges receipt of a copy of the above and foregoing motion, and consents to the amendment as requested therein.

Dated this 5th day of October, 1912.

UNION PACIFIC RAILROAD COMPANY,
By E. H. CROCKER,
EDISON RICH.

Endorsed: 47-76. Ella Huxoll, Admx. vs. U. P. R. R. Co. Motion—Clerk's Office, District Court, Lancaster County, Nebraska. Filed Nov. 6, 1912. J. S. Baer, Clerk Dist. Court.

Motion.

In District Court, Lancaster County, Nebraska.

ELLA HUXOLL, Administratrix, etc.,
vs.
UNION PACIFIC RAILROAD COMPANY.

Comes now the defendant and by leave of court files this its motion against the amended petition of the plaintiff.

1st. Defendant Asks that there be stricken from the 5th paragraph the following words "in the due course of his employment and service for the reason same states but a conclusion the pleader, no fact and are irrelevant and redundant.

2nd. To strike from said paragraph the following words "that had been stalled and was unable to proceed further by its own engine" and for the reason last above given.

3rd. To strike from said paragraph the following words "in obedience to said order and the discharge of the duties of his employment and not otherwise" for the same reasons as before given.

4th. To strike from said paragraph the following words "and had dressed suitably for the duties of said employment" and for the reason first given herein.

5th. To strike from said paragrap*g* the following words "by the usual route and way provided for passage by defendant" for the same reasons.

6th. To strike from said paragraph the following words "making necessary for deceased's own safety to make a slight detour in his course and to cross onto the defendant's main line track" for the same reasons.

7th. To strike from said paragraph the following words "a narrow and retreating or sloping water tank being universally and ordinarily employed for that purpose" and for the same reasons.

8th. To strike from said paragraph the following words "where switchmen can be stationed for lookout and upon which persons on the ground may step in event of approaching or impending collision with the engine" and for the same reasons.

9th. To strike from said paragraph the following words "for which it was not suitable, or designed or constructed" and for the same reasons.

10. To strike from said paragraph the following words beginning with the words "in the switching of engines" near bottom of fourth page of said answer and ending with the words "or other person in the yard" on the fifth page of said answer and all words inclusive and for the same reasons.

11th. To strike from said paragraph the following words "and in general and common practice a brakeman or other servant is so stationed for that purpose" and for the same reasons.

12th. To strike from said paragraph the following words "as is

provided by the locomotive engines constructed for and in comm use in the switching service" and for the same reasons.

13th. To strike from said paragraph the following words "wi out any brake or other appliance with which to stop the same" a for the same reasons.

14th. To strike from said paragraph the following words "Wi out any bell or other device to give warning of the approach there and for the same reasons.

15. To strike from said paragraphs the following words "so a prevent the engineer and fireman in charge of said engine from ing persons or objects in front thereof," and for the same reasons

16th. To strike from said paragraph the following words "a without ringing any bell or giving any other signal or warning" a for the same reasons.

17th. To strike from said paragraph the following words be -ing with the words "that it" found on top of sixth page of said p tion and ending with the words "Engineer or fireman" on said p and all inclusive and for the same reasons.

18th. To strike from said paragraphs the following words fo on page 4 of the petition "the said Fred J. Huxoll was wholly w out warning or knowledge of the employment thereof in said swi ing service" and for the same reasons.

19th. To strike from said petition the following wo
847 found in the said paragraph and on the 4th page the
"the engines ordinarily employed in said switching ser being of a construction that leaves the engineer a free and u structed view of the track ahead of him, whether moving forw or backward" and for the same reasons.

The defendant further moves that plaintiff be required to e whether she will stand upon the alleged negligent location and struction of its round house or upon the alleged negligent loca and construction of its water crane or upon its alleged negligent of a road engine for switching purposes or upon its alleged n gent operation of said engine at the time of the accident or upon alleged fact that it was at time of accident, operating an engine defective brakes or bell.

UNION PACIFIC RAILROAD COMPAN
By EDSON RICH,
E. F. PETTIS,
Its Att'ys.

Endorsed: 47-76. Huxoll vs. Union Pacific Railroad Comp Motion. Clerk's Office, District Court, Lancaster County, Nebra Filed Nov. 19, 1912. J. S. Baer, Clerk Dist. Court.

Journal Entry.

That on the 30th day of November, A. D. 1912 (that being 46th Judicial day of the October, A. D. 1912, term of said Co were had and done the following proceedings as appear upon C Journal "60" at page 688 to-wit:

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

This cause now comes on to be heard upon the motion of the defendant to strike certain portions from the petition of the plaintiff herein and to require the plaintiff to elect, and is submitted
848 to the court, on due consideration whereof, the court doth overrule the said motion, to which the said defendant excepts, and is hereby given leave to file answer herein within twenty days from this date.

Journal Entry.

That on the 17th day of September, A. D. 1913 (that being a day in vacation after the April, A. D. 1913, term of said Court), were had and done the following proceedings as appear upon Court Journal "63" at page 620 to-wit:

Order of Court.

47–76.

ELLA HUXOLL, Administratrix, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

Now on this 17th day of September, 1913, this cause came on for hearing before Hon. P. James Cosgrave, one of the Judges of the District Court on motion of the plaintiff to correct the Journal Entry entered on the 26th day of May, 1913, the plaintiff appearing by Walter V. Hoagland, and the defendant by W. P. Miles, the motion was submitted to Hon. P. James Cosgrave, and upon consideration thereof, the Judge finds an error was made in the journal entry continuing cause and that it should have provided that the defendant should pay in addition to the costs the proper expenses of plaintiff and counsel incurred and that plaintiff should be granted an exception to said order, and be granted forty days from the rising of court to prepare and present a bill of exceptions.

It is therefore considered and ordered by the Judge that the journal entry of this cause of date of May 26th, 1913, be amended "Nunc pro tunc" so as to provide for payment by the defendant, the proper expenses of plaintiff and counsel, in addition to costs.
849 That plaintiff be allowed an exception to the order granting a continuance and be allowed forty days to prepare and present "Bill of Exceptions" from rising of Court.

The Judge further finds that the proper expenses contemplated herein, are the following items:

Expenses of Plaintiff and party to Lincoln for trial	$114.
Expense account of witness Matthews	150.
Expense attorney Rose at trial	30.
Expense attorney Hoagland to Sidney	16.
Expense attorney Hoagland at trial	48.
Expense Hoagland for telephone	12.
Expense Hoagland for Telegraphing	5.
Total	$377.

And it is ordered that Defendant pay said amount of necess expenses in the sum of $377.56 for which execution is awarded.

To all of which both plaintiff and defendant excepts.

P. JAS. COSGRAVE,
Judge District Court

Journal Entry.

That on the 14th day of October, A. D. 1913 (that being the 1 Judicial day of the September, A. D. 1913, term of said Cou were had and done the following proceedings as appear upon Co Journal "64" at page 13 to-wit:

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day come the parties hereto, by their attorneys, a this cause coming on for trial, come also the following named p sons as jurors herein to-wit: R. A. Bickford, J. H. Dicks
850 J. F. Reiner, Thomas Buckley, George Allenbach, E. Witham, V. C. Gaffney, W. Z. Pollard, H. A. Flaker, C. Piper, B. H. Grant, E. C. Forrest, all of the regular panel, who w duly impaneled and sworn herein, according to law, and after opening statements were made to the jury, and the hour of adjou ment being at hand, the jury were duly admonished by the Co and excused until October 15, at nine thirty o'clock to which ti further proceedings herein are continued

Journal Entry.

That on the 15th day of October A. D. 1913 (that being the 1 Judicial day of the September A. D. 1913 term of said Court) w had and done the following proceedings as appear upon Court Jo nal "64" at page 16 to-wit:

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day again come the parties hereto by their attorneys and come also the jury heretofore impaneled and sworn herein, according to law, and trial of this cause proceeds, testimony of witnesses adduced in part, and the hour of adjournment being at hand, the jury are duly admonished by the court and excused until tomorrow morning at nine thirty o'clock to which time further proceedings are continued.

Journal Entry.

That on the 16th day of October A. D. 1913 (that being the 15th Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 18 to-wit:

851 47–76.

ELLA HUXOLL
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day again come the parties hereto with their attorneys, and comes also the jury heretofore impaneled and sworn herein, according to law, and trial of this cause proceeds, and after hearing further testimony of witnesses adduced and the hour of adjournment being at hand, the said jury are duly admonished by the court and excused until October 17, at nine thirty o'clock to which time further proceedings herein are continued.

Journal Entry.

That on the 17th day of October A. D. 1913 (that being the 16th Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 20 to-wit:

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day come the parties hereto with their attorneys and come also the jury heretofore impaneled and sworn herein, accord-

ing to law, and trial of this cause proceeds, and after hearing further testimony of witnesses adduced, the plaintiff rests, and the hour of adjournment being at hand, the said jury are duly admonished by the Court and excused until October 20, 1913, at nine thirty o'clock A. M. to which time further proceedings herein are continued.

Journal Entry.

That on the 20th day of October A. D. 1913 (that being the 18th Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court
852 Journal "64" at page 24 to-wit:

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day again come the parties hereto with their attorneys, and come also the jury heretofore impaneled and sworn herein according to law, and trial of this cause proceeds, and after hearing further evidence of witnesses adduced, and the hour of adjournment being at hand, and said jury are duly admonished by the court and excused until October 21st, at nine-thirty A. M. to which time further proceedings herein are continued.

Journal Entry.

That on the 21st day of October A. D. 1913 (that being the 19th Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 28 to-wit:

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day again come the parties hereto with their attorneys, and come also the jury heretofore impaneled and sworn herein according to law, and the trial of this cause proceeds, after hearing the testimony of witnesses adduced, in part, and the hour of adjournment being at hand, the said jury are duly admonished by the Court and excused until October 22, 1913, at nine-thirty o'clock A. M. to which time further proceedings herein are continued.

853 *Journal Entry.*

That on the 22nd day of October A. D. 1913 (that being the 20th Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 33 to-wit.

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day again come the parties hereto with their attorneys, and come also the jury heretofore impaneled and sworn herein, according to law, and the trial of this cause proceeds, and after hearing further testimony of witnesses adduced, and the hour of adjournment being at hand, the said jury are duly admonished by the court, and excused until October 23, 1913, at nine thirty o'clock A. M. to which further time proceedings herein are continued.

Journal Entry.

That on the 23rd day of October A. D. 1913 (that being the 21st Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 36 to-wit:

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day again come the parties hereto with their attorneys and come also the jury heretofore impaneled and sworn herein, according to law and on request of the plaintiff, by her attorney the instruction of the court read to the jury before the argument of counsel, and after hearing the argument of counsel for plaintiff and defendant, the said jury retired to their room in custody of the Sheriff, to deliberate upon their verdict.

854 *Journal Entry.*

That on the 24th day of October A. D. 1913 (that being the 22nd Judicial day of the September A. D. 1913 term of said Court) were had and done the following proceedings as appear upon Court Journal "64" at page 39 to-wit:

47–76.

ELLA HUXOLL, Administratrix,
vs.
UNION PACIFIC RAILROAD COMPANY.

Now on this day again come the parties hereto with their attorneys, and come also the jury heretofore impaneled and sworn herein, according to law, with their sealed verdict in writing, and say,

"THE STATE OF NEBRASKA,
Lancaster County, ss:

September Term, A. D. 1913, To wit: October 23, 1913.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant.

We the jury, duly impaneled and sworn in the above entitled cause, do find in favor of the plaintiff and against the defendant and we do assess the amount of plaintiff's damages at the sum of $20,000.00.

We apportion the sum so awarded among the beneficiaries as follows.

To Ella Huxoll, widow..... $6,668.00
To Marian Huxoll, infant daughter..... $6,666.00
To Frederick A. Huxoll, infant son..... $6,666.00

E. C. WITHAM, *Foreman.*"

Whereupon it is by the Court ordered that the said jury be and hereby are discharged from further deliberation of this case.

855 It is therefore considered, ordered and adjudged by the Court that in accordance with the verdict of the said jury, the said plaintiff Ella Huxoll, Administratrix, do have and recover of and from the said defendant, Union Pacific Railroad Company, the said sum of Twenty Thousand ($20,000.00) Dollars, and that the said sum be apportioned as follows: Six Thousand Six Hundred Sixty eight ($6,668.00) Dollars in favor of Ella Huxoll, widow; Six Thousand Six Hundred Sixty six ($6,666.00) Dollars in favor of Marion Huxoll infant daughter; and Six Thousand Six Hundred sixty-six ($6,666.00) dollars in favor of Frederick A. Huxoll, infant son, together with the costs of this action, taxed at $— for which execution is hereby awarded.

Certificate.

TATE OF NEBRASKA,
Lancaster County, ss:

I, J. S. Baer, Clerk District Court Third Judicial District of Nebraska in and for the County of Lancaster do hereby certify that he above and foregoing is a true and correct copy of Motion for eave to Amend Petition and Motion to Strike, with all endorsements n each, with Proceedings of trial and Judgment in a cause in said ourt wherein Ella Huxoll, Administratrix is plaintiff and Union acific Railroad Company is defendant as the same appears fully pon the records and files of said Court and now in my charge re- aining as clerk aforesaid.

Witness my hand and seal of said Court at Lincoln this 18th day f August A. D. 1915.

[SEAL.] J. S. BAER,
Clerk Dist. Court,
By W. C. BURCHAM, *Deputy.*

Trans. fee $3.20.
Documentary Stamp 10¢.

56 Endorsed: 18377. Supreme Court Nebraska. Ella Huxoll, Adm'x vs. Union Pacific Railroad Co. Additional & Supemental Transcript. Supreme Court of Nebraska. Filed Oct. 8 915. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 19th day of October, 1915, the llowing among other proceedings were had and done in said upreme court, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1915.

Oct. 19.—The following causes were argued by counsel and subitted to the court:

No. 18377.

HUXOLL
v.
UNION PACIFIC R. CO.

Appeal from Lancaster County.

OSE, *J.*, not sitting.

And afterwards, to-wit, on the 23d day of December, 1915, there as rendered by said court and entered of record upon the journal ereof a certain Judgment, in the words and figures following, -wit:

Supreme Court of Nebraska, September Term, A. D. 1915.

Dec. 23.

No. 18377.

ELLA HUXOLL, Adm'x, Appellee,
v.
UNION PACIFIC R. Co., Appellant.

Appeal from the District Court of Lancaster County.

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and sub
857 mitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed at the costs of appellant, taxed at $—. For all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Letton, J. Hamer and Rose, JJ. not sitting.

A. M. MORRISSEY,
Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

858 No. 18377.

HUXOLL
v.
UNION PACIFIC RAILROAD CO.

Opinion filed December 23, 1915.

1. Under section 7713, Rev. St. 1913, an error which does not affect the substantial rights of a party will not justify a reversal of a judgment.

2. Under the Federal Employers' Liability Act contributory negligence is not a complete defense in any case, and assumption of risk is only eliminated as a defense in cases where the "violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 4 U. S. Comp. St. 1913, sec. 8659, p. 3914.

3. An employee assumes the ordinary risks of his employment, but he does not assume the extraordinary risks caused by direct acts of negligence of his employer.

4. Glantz v. Chicago, B. & Q. R. Co., 90 Neb. 606, 611, followed.

5. Plaintiff's intestate was a locomotive engineer in the service of the defendant. He was directed to take an engine stationed in
859 the yard of defendant at Sidney and proceed to another point on the line for the purpose of bringing in a train used in interstate commerce. A strong north wind was blowing, the thermometer was 10 to 15 degrees below zero, snow was on the ground and was drifting, and clouds of smoke and steam from the roundhouse and from engines made it almost impossible to see ahead. As deceased was approaching his engine he went between the rails of the main line track. A high tank road engine engaged in switching in the yards, moving backwards, without lookout, warning or signal, at a rate variously estimated at from three to eight miles per hour, at a point where the smoke and steam were so dense that objects one or two feet away could not be seen, struck and killed the deceased.

Held, that a finding that the defendant was guilty of actionable negligence is sustained by the evidence and that the question whether the deceased was guilty of contributory negligence was for the jury.

6. A locomotive engineer in walking to his engine in the switching yards of a division station through a cloud of smoke and steam does not assume the risk that his employer will negligently propel an engine backwards through the yards and through dense clouds of smoke and steam without warning of some character either by bell, whistle, light or lookout.

860 7. Instructions given and refused examined and Held, that no prejudicial error was committed by the court with respect thereto.

8. It is within the discretion of the court to submit special interrogatories to the jury when requested, and unless an abuse of such discretion is shown such a refusal will not be held to be erroneous.

9. Instructions given to the jury will be considered together and if the charge taken as a whole properly and fairly submits the issues in the case, a mere technical inaccuracy in one or more will not justify a reversal of the judgment for that reason alone.

861 LETTON, J.:

This is an action to recover damages on account of the death of Fred J. Huxoll, the husband of the plaintiff, by reason of certain alleged acts of negligence on the part of the Union Pacific Railroad Company. Plaintiff as administrator recovered judgment for $20,000 for the benefit of herself and children. Defendant appeals.

Huxoll left surviving him his widow and two minor children. At the time of his death he lived at North Platte and was a locomotive engineer in the service of the defendant, running between North Platte and Sidney. On the morning of January 1, 1911, Huxoll, while at Sidney, was called and ordered to take engine No. 1909, to leave at 11:10 A. M. with another engine and run to Perdue to bring in a freight train. The engine was headed westward and was to run backward to Perdue. At the time of the accident he was proceeding to his engine in response to the call. The train he was

to move was being used in interstate commerce. The train order gave these engines a clear track, and right of way over all trains on the main line. Sidney is a division station and defendant maintains there a roundhouse, turntable, water-crane, wash-house and switching yards. Near the water-crane there is what is known as a "spot track" on which engines are stationed after being coaled, watered and made ready to be taken out. The water-crane and "spot track" are some distance south and east of the wash-house. In order to reach the engine it was necessary for Huxoll to cross one or more tracks and to proceed some distance eastward, pass-
862 ing the turn-table, with the main line track to the north.

On this morning engines 1913 and 1909 were upon the "spot track," 1913 standing at the water-crane and 1909, Huxoll's engine, farther east. The weather was extremely cold, 10 to 15 degrees below zero, and a strong north or northwest wind was blowing. The roundhouse is situated to the south of a bluff, the elevation of which is from 100 to 200 feet in height. It was snowing and the ground and tracks were covered with snow about two inches deep when undisturbed by the wind. Clouds of smoke from the roundhouse, steam from the engines and snow from the storm were blowing across the yards and in places it was almost impossible to see more than a foot or two. The water-crane stood upon a small platform about 12 feet long from east to west. There was a pit and drain connecting with a sewer in order to carry off the overflow, but, on account of the intense cold there was more or less ice around and about the platform. Plaintiff's theory of the case, which is supported to some extent by testimony, is, that as Huxoll, in going to his engine, approached the crane and platform, in order to avoid walking upon the ice he stepped around it upon the main line track. There was a cloud of fog, steam and smoke at that point. Almost instantly he was struck by an engine running backwards to the west which gave no signals of its approach and which was running about eight or ten miles an hour. The whistle was not sounded, and the bell was not rung, the machinery to ring the bell automatically was out of order, and the power brake upon this engine was defective. Huxoll
863 was knocked down, was dragged by the ash-pan and brake beams a distance of about 75 feet and the leading end of the engine moved about 150 feet before it was stopped. He was then extricated but died soon afterwards.

The specific allegations of negligence in the petition, much abridged, are, negligence of defendant in maintaining the roundhouse in close proximity to the main line track and to the water-crane and engine tracks so that the smoke and steam therefrom enveloped and obscured its engines and obstructed the view of engine and train movements upon the tracks. Negligence in permitting an accumulation of ice about the crane: in permitting the crane to become out of order so as to permit the escape of water on the ground, where it froze and rendered the way slippery and dangerous, making it necessary for Huxoll's safety that he make a slight detour in his course, and go upon the main line track; negligence and carelessness in using in switching an ordinary locomotive with high tank, instead of a switch engine with a sloping tank, so as to allow

free and unobstructed view of the track in either direction and in
ailing to station a man on the front end of the engine for the pur-
ose of warning persons upon the track, and it is alleged that "in
eneral and common practice a brakeman or other servant is so sta-
ioned for that purpose"; negligence in not providing a foot-board,
nd in running the engine at a high and dangerous rate of speed,
and not under control." It is also charged by amendment that the
power brake on the engine was broken and defective, that the
64 bell was defective and out of repair and that no warning sig-
nals of any kind were given.

The answer in substance is a general denial with a plea of assump-
on of risk and contributory negligence. An amendment was filed
leading that the acts of negligence set out in the amendment to the
etition were not alleged in the original petition and were not
harged within two years after such acts are alleged to have occurred.
Defendant assigns 56 errors as ground for the reversal of the
idgment. We cannot consider them in detail. Some are com-
laints of mere technical irregularities of a nature which may and
sually do occur in the trial of almost every case where so much
stimony was taken. We have passed the day when an error which
oes not injuriously affect the substantial rights of a party will
ntitle him to a reversal of the judgment and it serves no useful
urpose for parties to complain of or for courts to consider and dis-
ss mere lapses from strict and formal methods of procedure. This
pplies with most force, perhaps to assignments of error in rulings
pon the admission of evidence. Unless prejudice appears to have
sulted from an erroneous ruling of this nature a judgment will not
e reversed upon that ground.

Many assignments of error are made as to the giving and refusal
f instructions. The court gave 29 instructions on his own motion.
he defendant requested 47. In its charge the court practically
iminated a number of the grounds on negligence charged in the
petition. The only questions left were whether the defend-
65 ant was guilty of negligence in failing to have a lookout on
the leading end of the switch engine; in moving it at an
xcessive rate of speed under the circumstances and in failing to
eep it under control; whether the track was obscured by smoke and
eam; whether the death of Huxoll resulted in whole or in part from
s negligence; whether the power brake of engine No. 213 was in
orking order at the time of the accident, and if not in working
rder, whether such condition contributed to his death.

The complaint is made that the court should have told the jury
hat Huxoll was guilty of contributory negligence, as a matter of
w, and that each of the instructions tendered by defendant should
ave been given. The instructions tendered by defendant endeav-
red to separate into distinct elements each charge of negligence
ade by plaintiff, and requested a specific direction that each of these
harges would not warrant a verdict for the plaintiff. Some of these
structions are so clearly erroneous that they are not worthy of con-
deration and should never have been requested. Such requests
tail needless labor upon trial and reviewing courts. An illustra-
on is No. 2 which asked the court to instruct that Huxoll was not

engaged in interstate commerce at the time he received the injurie
The substance of some and the identical language of a number
others were adopted by the court and incorporated as a part of
own instructions.

The gist of the requested instructions is contained in defendan
No. 1, that the jury be directed to find for the defendan
866 The testimony is so conflicting, not only for the reason th
the witnesses differ, but because some of the witnesses
each party told materially different stories at different time-, th
it is almost impossible for a reviewing court, which cannot see t
witnesses, to determine what the true facts are. The verdict of t
jury must be taken as settling their credibility.

We will endeavor to notice the assignments in the order follow
in defendant's brief, but cannot within the proper limits of an opi
ion discuss them at length. It is contended that the court shou
not have submitted to the jury any issue as to the condition of t
brakes on engine No. 213. There is a sharp conflict in the te
mony with respect to the condition of these brakes. Zimmer, t
engineer, testified that about 8 o'clock of that morning he notic
that the air was not working properly and he found upon inves
gation that the brake pistons were not working on account of
that was frozen upon them, coming from a washout plug above the
that he then procured and set fire to some waste and oil and appli
it to the brake cylinders until the brakes worked and he had
more trouble with them. The testimony of other engineers, havi
experience with air brakes, but who do not testify with respect
this particular engine, is that in very severe, cold weather, the
appliances sometimes freeze and require to be thawed out. Mathe
the fireman, testified the air was not working, and the brakes co
not be used at the time of the accident. The other m
867 working with the engine testify that the brakes were in p
fect working order at that time. If material, there was su
cient conflict in the evidence to take the matter to the jury.

We are unable to see wherein the condition of the brakes h
anything to do with the accident, unless an inference may be dra
from the testimony that if the brakes had been working proper
the engine, after knocking Huxoll down, would not have injur
him fatally; that when the switchman on the engine called to t
engineer, an immediate stop could have been made, and Hux
would not have been entangled in the brake. If the engine w
only moving at the rate of three or four miles an hour, as these m
say, the evidence shows that if the brakes had been set at once t
engine would have made a quick stop and would not have dragg
Huxoll for 60 or 70 feet. Riggs called to the engineer as soon as
felt the jolt occasioned by the trucks running over Huxoll. T
accident would have happened if the brakes had been working sm
they were not applied or attempted to be applied until after Hux
had been knocked down and run over. It seems a fair inferen
that Huxoll was fatally injured when run over by the trucks
though he was conscious after being extricated, but the evidence
not entirely clear and we think there is sufficient doubt to rend
this a question for the jury. Defendant argues that if decea

was injured by a defective brake the defense of assumption of risk and contributory negligence are by the Federal statute eliminated and that it, therefore, was prejudicially erroneous to allow this issue to go to the jury. This is not quite accurate. The Fed-
868 eral Employers' Liability Act provides that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 4 U. S. Comp. St. 1913, sec. 8659, p. 3914. It is also provided that "such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributes to the injury or death of such employee." 4 U. S. Comp. St. 1913, sec. 8660, p. 3914. The Safety Appliance Act made it unlawful for any such carrier to use "any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system." 4 U. S. Comp. St. 1913, sec. 8605, p. 3892. The defense of assumption of risk is not permitted when the Safety Appliance statute is violated, but contributory negligence is a defense pro tanto in all cases. We cannot give this matter the importance attached to it by defendant. Independent of the provisions of the Federal Law, we take the view that though Huxoll assumed the ordinary risks of his employment, he did not assume such an extraordinary risk as that his employer would carelessly and negligently, while he was enveloped in a dense cloud of smoke and steam and was engaged in proceeding to his engine in the course of his duties, without warning or signal of any kind, run an engine through the fog and darkness upon him at such a rate of speed that it was impossible for him to know
869 that it was coming until he was struck. Under the undisputed facts the applicability of the safety appliance law is of no importance and contributory negligence is proper as a partial defense, regardless of whether a defect in the brake was proved.

It may be as well at this point to say that there is practically no conflict in the evidence with respect to the condition of the weather, and the density of the clouds of smoke and steam that were flying; men who were working from 17 to 25 feet away from the switch engine as it passed the water-crane neither heard nor saw the engine until after the accident. There is conflict as to the extent of ice on or about the water-crane and platform and a positive and direct conflict as to whether the bell was sounded on the switch engine; whether the bell ringing apparatus was in working order; as to the rate of speed that the engine was moving, and as to whether it was a custom or usual practice in the Sidney yards for a man to be stationed upon the foot board at the forward end of the switch engine in order to warn persons on the tracks.

It is shown by the testimony of defendant's employees that in conditions such as were prevalent that morning where the vision was blinded by storm or fog, proper care in the movement of trains in the yards required greater precautions than when the vision is clear.

It is argued that the court erred in refusing instructions telli
the jury that there was no evidence that defendant was negligе
in the location of its roundhouse or in permitting clouds
870 smoke and steam to escape therefrom, and in giving instr
tion No. 15, which is as follows: "The distance from t
main-line track at which the roundhouses of the defendant w
located, the elevation of the ground beyond the roundhouses, t
tendency of smoke from the roundhouses to collect about the trac
and the presence of ice, to some extent, at least, in the vicinity
the water-crane, together with the conditions of the weather, as sho
by the evidence, are proper subjects of consideration in determini
whether the acts of the defendant's servants, on the one hand a
of the deceased, on the other, were such as persons of ordinary c
and prudence would have done at the time and under the con
tions surrounding the casualty in question; but the incidents j
referred to are not, in and of themselves, causes or grounds of neg
gence upon which a recovery in favor of plaintiff can be hac
There was no error in this. It would have done no harm to ha
given the requested instructions withdrawing these ground-, but t
was practically done by the foregoing instruction, and it was c
tainly proper to allow the jury to consider all the surrounding c
cumstances in determining whether the defendant's servants w
negligent and whether the deceased acted with proper care.

Assignments 5, 6 and 7 are with respect to the refusal to char
that the water-crane was not out of repair and that there was no e
dence that ice had negligently been permitted to accumulate arou
and about it. The charge that there was no proof that the wat
crane was out of repair might properly have been given b
871 the jury could not have been misled by the failure to give
As to the evidence of ice about the water-crane, Dupont, t
fireman on Huxoll's engine, testified that Huxoll and he went sou
west from the wash-house to a point between the turn-table and t
main line and then went east, he walking north of the main li
and Huxoll about 10 feet behind him between the rails; that wh
about 30 feet west of the crane he heard a noise like an engi
either east or west of them and called to Huxoll; that his grip w
struck by an engine and knocked out of his hand and he turned a
that instant saw Huxoll knocked down. In a previous stateme
he had said that Huxoll was struck about 10 or 12 feet west of t
water-crane. The yardmaster testified that there was more or le
ice all about the platform and track at the crane and that about
feet west of the crane he found marks in the snow in the middle
the track that indicated Huxoll had been knocked down at th
point. This is only about two steps from the west end of the pla
form. If the jury disbelieved Dupont's later testimony and the
was ice frozen on and about the platform, Huxoll, if walking pa
allel with the main track, may have stepped between the tracks
avoid the ice, or he may have lost his way in the dense cloud
smoke and steam. Plaintiff argues that Huxoll's body may ha
been driven backward when he was struck, so that he fell further
the west than where he was walking when struck—whether this
a proper inference was a matter for the jury. We think that all th

facts as to the conditions surrounding the water-crane and
872 platform were proper to *to* be submitted and no prejudicial error was committed in relation to this issue.

The next complaint argued is as to the instructions given and refused with respect to whether there was a rule or custom requiring switchmen to ride on the leading end of the switch engines in the Sidney yard. There is a conflict of evidence upon this and the evidence to establish such custom is not strong. It may be noticed that a number of the questions asked by counsel for the defendant upon this point contain a negative pregnant. For example, in the examination of the foreman in charge of the roundhouse, defendant asked: "Do you know whether or not there was, or was not a custom or practice, in that yard, on January 1, 1911, or prior to that time of having any switchman riding on the leading end of the engine through the yards, for the purpose of warning or giving warning to the engineer of obstruction upon the track, or flagging the engine through steam or smoke? A. No, sir, there was no practice that I know of, or observed." A similar question was asked Mr. Borton, the yardmaster: "Q. What was the practice or custom with reference to having a flagman or a switchman on the front end of an engine in switching in the yards—on the leading end of the engine, in order to flag the engine through steam or smoke or storm? A. We never put a man there for that purpose, it wasn't necessary." The questions do not ask whether a custom of placing men upon the leading end of engines while moving in the yards existed, but whether it was the custom to put them there to warn the
873 engineer or to flag the engine. The court is committed to the doctrine of Glantz v. Chicago, B. & Q. R. Co., 90 Neb. 606, 611, that to run a high tank road engine backwards through railroad yards without a lookout, when to have one is the usual custom in such yards, is a negligent act. This is a humane doctrine, and we adhere to it. It may be true as defendant asserts that the cloud was so dense that a lookout could not have warned Huxoll until too late, but the surrounding conditions were in evidence and the matter was for the jury.

The court in this connection gave the following instruction: "25. The fact the road engine No. 213 was used by defendant for switching purposes at the time of the accident, is not in and of itself, negligence, and a recovery in plaintiff's favor cannot be based upon the fact that such engine was so used. It is proper, however, to take into consideration the type, form and equipment of said road engine, and any variance in its equipment from the class and type of engine usually employed in the switching service, in determining whether the acts of defendant's servants, on the one hand, and of the deceased, on the other, were such as persons of ordinary character and prudence would have done at the time and under the conditions surrounding the casualty in question." This is as far as the court should have gone in withdrawing this issue from the jury.

Defendant contends there is no duty on the part of a railroad

company to warn employees in its yards of moving engine
874 and cites the case of Anderson v. Missouri P. R. Co., 95 Neb
358, 145 N. W. 842, as establishing such a principle. N
such weather conditions obtained in that case and the rule an
nounced cannot apply here.

Complaint is made that many of defendant's rules relating t
the general operation of engines and not confined to their operatio
in switch yards were erroneously admitted in evidence. This
true as to several of the rules read to the jury and if we were satisfie
the jury had been misled by any of this evidence we would witho
hesitation reverse the judgment. But we are not so convinced. On
of the rules complained of requires yard engines to display a hea
light to the front and rear, by night, and another rule provid
that "When weather or other conditions obscure day signals, nig
signals must be used in addition." These rules were relevant an
it was for the jury to determine whether they were violated. D
fendant was by no means free from the erroneous practice of offe
ing immaterial rules. Other testimony was improperly admitte
but we are unable to see how its admission could have changed th
result. It is complained that the court erred in refusing to subm
a special interrogatory as to the amount which the jury deducte
for contributory negligence. The amount of the verdict indicat
that the jury found no contributory negligence existed. The su
mission was a matter for the discretion of the trial court and
abuse of discretion has been shown.

We are convinced that the facts in the case warrant the concl
sion reached by the jury. The peculiar conditions demand
875 special care. Granting that the brakes were not out of
pair, that there was no ice around the water-crane that
quired Huxoll to step between the tracks to avoid it, and that it w
not customary to have a lookout on the leading end of the engi
under ordinary conditions, still the reckless manner in which t
engine was sent into the fog and cloud in the yard, without warnin
as the jury evidently believed and found from the evidence, co
stituted such carelessness as to justify a verdict, and the questi
whether under all the conditions Huxoll was guilty of contributo
negligence in being between the rails when struck was also one
the jury to determine.

The questions of law governing this case are few and simp
though the record is long and the briefs are elaborate, we find
error prejudicial to the substantial rights of the defendant and t
judgment of the district court is, therefore, affirmed.

Hamer and Rose, JJ., not sitting.

876 And afterwards, to-wit, on the 25th day of January, 19
there was filed in the office of the clerk of said supreme co
of Nebraska by the Union Pacific Railroad Company, its Assignme
of Errors with the Prayer for Reversal thereto attached, which s
original Assignment of Errors is attached hereto.

877 In the Supreme Court of the State of Nebraska.

General No. 18377.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Assignment of Errors.

Now comes Union Pacific Railroad Company, appellant (defendant below), and shows to the court that the above entitled case is an action brought by Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, under an Act of Congress commonly known as the Federal Employers' Liability Act, approved April 22d, 1908, and amendments thereto; and that in the records, proceedings and final judgment of the Supreme Court of the State of Nebraska in said cause, there are the folowing errors upon which the said Union Pacific Railroad Company will rely in the prosecution of the writ of error herein, parties being hereinafter designated as plaintiff and defendant, respectively, as in the court below.

1.

The court ererd in affirming the judgment of the District Court of Lancaster County, Nebraska, in favor of the plaintiff and against the defendant.

2.

The court erred in holding that the motion of the defendant, Union Pacific Railroad Company, made at the close of the whole case for a directed verdict in its favor, was properly overruled.

3.

The court erred in holding that there was sufficient evidence introduced at the trial to sustain a verdict of the jury in favor of the plaintiff and against the defendant.

878 4.

The court erred in holding that the trial court did not err in refusing to grant the defendant's instruction No. 1, which reads as follows:

"You are instructed to return a verdict in favor of the defendant."

5.

The court erred in holding that under the pleadings and evidence in this case, the trial court was justified in submitting to the jury the

question as to whether or not a violation of the Safety Appliance Act contributed to the death of Fred J. Huxoll.

6.

The court erred in holding that the trial court did not err in submitting to the jury the question as to whether or not the condition of the brakes on the engine which ran over Fred J. Huxoll contributed to the death of Fred J. Huxoll.

7.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 6, which reads as follows:

"You are instructed that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of the defendant to comply with any Act of Congress enacted for the safety of employes."

8.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 17, which reads as follows:

"You are instructed that you cannot base a verdict against the defendant on the ground that the brakes on the engine 213 were out of repair, broken, or not in working order, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of engine 213 to stop sooner than it did after the engineer was given a signal to stop."

9.

The court erred in holding that the trial court did not err
879 in giving instruction No. 12, which reads as follows:

"The evidence shows, without dispute, that the railroad of the defendant, of which the yard at Sidney, where the accident in question occurred is a part, is a highway of interstate commerce and that defendant's road engine No. 213, which collided with de ceased, Fred J. Huxoll, was an engine which the defendant used in hauling interstate commerce. An act of congress required that such engines be equipped with a power driving wheel brake so that the engineer can control its speed without requiring the use of a com mon hand brake. The act of congress under which this suit is prosecuted, making carriers by railroads while engaged in interstate commerce responsible for injury or death to an employe resulting in whole or in part, from negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery tracks, roadbed or other equipment, provides among other things that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence or to have assumed

the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe. If you find from the evidence that the death of Fred J. Huxoll resulted in whole or in part from the negligence of any of the officers, agents, or employes of the defendant, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed or other equipment, alleged or charged in the petition, and that the power brake of defendant's road engine No. 213 was not at the time of the accident in working order and could not then be used by the engineer on such locomotive to control its speed, and the fact that such power brake was not in working order and could not be used by the engineer to control the speed of the engine, contributed to the death of Fred J. Huxoll, then the law is that the deceased, Fred J. Huxoll, cannot be held either to have been guilty of contributory negligence or to have assumed the risks of his employment."

10.

The court erred in holding that the trial court did not err in giving instruction No. 16, which reads as follows:

"The law is that a servant by his contract of employment, assumes the ordinary risks and dangers incident to his employment, but in this case the deceased, Fred J. Huxoll, cannot be held to have assumed the risks of his employment if you find that the power driving wheel brake on defendant's engine No. 213 with which he collided, was not at the time of the accident in working condition, and that fact contributed to his death. The ordinary risks and dangers of a servant's employment assumed by him as a matter of law do not include risks and dangers due to the master's negligence unless such risks and dangers are actually known to the servant or are open and obvious."

880

11.

The court erred in holding that under the Federal Employers' Liability Act contributory negligence goes in mitigation of damages even where a violation of the Safety Appliance Act contributed to the death of the employe.

12.

The court erred in holding that the evidence introduced in this case would not justify the jury in finding that Fred J. Huxoll assumed the risk of being killed in the manner he was killed.

13.

The court erred in holding that there was no evidence in this case which would justify submission to the jury of the defense of assumption of risk.

14.

The court erred in holding that under the Federal Employers' Liability Act an employe assumes the ordinary risks of his employment, and does not assume extraordinary risks caused by direct acts of negligence on the part of his employer.

15.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 7, which reads as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant was negligent in locating its round house at the point where it was located on January 1st, 1911, and that that charge of negligence contained in plaintiff's petition is withdrawn from your consideration."

16.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 8, which reads as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant was negligent in permitting clouds of smoke and steam to escape from its round house at Sidney on January 1st, 1911, and that that charge of negligence contained in the plaintiff's petition is withdrawn from your consideration."

881

17.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 9, which reads as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant had negligently permitted the water crane referred to in the plaintiff's petition to become so out of repair that it permitted the escape of water on the ground, and that that charge of negligence contained in plaintiff's petition is withdrawn from your consideration."

18.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 10, which reads as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant had negligently permitted an accumulation of ice about and in the vicinity of the water crane referred to in the plaintiff's petition, and that that charge of negligence contained in said petition is withdrawn from your consideration."

19.

The court ered in holding that the trial court did not err in giving instruction No. 15, which reads as follows:

"The distance from the main line track at which the round houses of the defendant were located, the elevation of the ground beyond the round houses, the tendency of smoke from the round houses to collect about the tracks, and the presence of ice, to some extent, at least, in the vicinity of the water crane, together with the conditions of the weather, as shown by the evidence, are proper subjects of consideration in determining whether the acts of the defendant's servants, on the one hand and of the deceased, on the other, were such as persons of ordinary care and prudence would have done at the time and under conditions surrounding the casualty in question; but the incidents just referred to are not, in and of themselves, causes or grounds of negligence upon which a recovery in favor of plaintiff can be had."

20.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 11, which reads as follows:

"You are instructed that there is no evidence in this case tending to show that the defendant was negligent in using engine 213 in the switching service at Sidney on January 1st, 1911, instead of an engine of another type and that that charge of negligence contained in the plaintiff's petition is withdrawn from your consideration."

21.

882 The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 13, which reads as follows:

"You are instructed that you cannot find a verdict against the defendant on the ground that it negligently used engine 213 in the switching service on January 1st, 1911, instead of a different type of engine, for the reason that there is no evidence in this case tending to show that if a different type of engine had been used Fred Huxoll could have seen said engine approaching, or the employes on said engine could have seen Fred Huxoll in time to have averted the accident, or that the death of Fred Huxoll was caused in whole or in part by the failure of the defendant to use a different type of engine."

22.

The court erred in holding that the trial court did not err in giving instruction No. 25, which reads as follows:

"The fact that road engine No. 213 was used by defendant for switching purposes at the time of the accident, is not in and of itself, negligence, and a recovery in plaintiff's favor cannot be based upon the fact that such engine was so used. It is proper however to take into consideration the type, form and equipment of said road engine and any variance in its equipment from the class and type of engine usually employed in the switching service, in determining

whether the acts of defendant's servants, on the one hand and of the deceased, on the other, were such as persons of ordinary character and prudence would have done at the time and under the conditions surrounding the casualty in question."

23.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 14, which reads as follows:

"You are instructed that there is no evidence in this case tending to show that there was a general custom in vogue in the yards at Sidney, of having a switchman on the forward end of a switch engine for the purpose of keeping a lookout and warning the engineer and those upon the track of the presence of danger and that you cannot find a verdict against the defendant on the ground that such a custom did exist and was not being followed by the defendant at the time Huxoll received the injuries which resulted in his death."

24.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 22, which reads as follows:

883 "You are instructed that habits or custom of defendant's employes, such as brakemen, switchmen or others, of riding on the foot board of its engines, and facing the direction in which the engine was moving, if any such habit or custom you believe from the evidence to have existed, would not be binding on the defendant company so long as such habits were for their own convenience and were not required by the defendant company for the purpose of warning employes or others from the track."

25.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 23, which reads as follows:

"You are instructed that an instance or illustration of riding for their own convenience would be the case of a switchman whose duty it was to throw a switch to enable the engine to pass to another track and, who, to save himself the effort of walking or to save time rode the engine to the switch. Another instance might be that of a brakeman or switchman, one of whose duties was to couple the engine to a car or string of cars, and who, for the purpose of saving his steps or time, rode the engine to the car to be coupled on to. In other words, before you can find the defendant company negligent in failing to have an employe upon the front end of the engine (meaning thereby the end in the direction the engine was moving) you must first find that either by rule or custom of the defendant company such person must have been required to have been riding there for the express and known purpose of, among other things and other duties, of giving warning of the approach of

the engine and of signaling the engineer of the presence of a person or other object upon the track over which the engine was passing. It is not enough to find the defendant negligent on this point that as suited their convenience, switchmen, brakemen, or other employe did ride on that part of the engine herein referred to, either as a matter of convenience for themselves, or as a matter of habit between themselves."

26.

The court erred in holding that the trial court did not err in giving instruction No. 13, which reads as follows:

"Among the allegations of the petition are the averments that in defendant's switching operations and particularly in its yard at Sidney, the safety of its employes and servants in and about the yards and of those called there for any special service required a brakeman or servant to be stationed on the leading end of the head car or engine for the purpose of keeping a lookout and warning the engineer and those upon the track of the presence of danger by collision or otherwise in time to be able to stop the engine or cars before colliding with any servant within the yard and that in general and common practice a brakeman or servant was so stationed for that purpose. The petition charges that in the movement of the engine which inflicted the fatal injuries complained of, no brakeman or other servant was placed at the rear or leading end of
884 the engine to keep a lookout ahead and that no foot board or other place of rest was provided on said engine for that purpose, as is provided by locomotive engines in common use in the switching service, and that the defendant negligently and carelessly failed to so station a servant to keep a lookout or to provide an engine suitably equipped therefor. If you find from the evidence that it was the custom of the defendant railroad company, at that time, to have a man stationed on the footboard on the leading end of the engine or cars as a lookout, and that the defendant was guilty of negligence in failing to so station a man as a lookout, and that the death of Fred J. Huxoll resulted, in whole or in part, from such negligence, then the plaintiff would be entitled to recover in this action."

27.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 15, which reads as follows:

"You are instructed that you cannot find a verdict against the defendant on the ground that engine 213 was being negligently operated at a high and dangerous rate of speed at the time that it struck the deceased, Fred Huxoll, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the operation of said engine at a high and dangerous rate of speed, even though you should find that said engine was in fact being operated at a high and dangerous rate of speed."

28.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 21, which reads as follows:

"You are instructed that you cannot base a verdict against the defendant in this case on the ground that the defendant gave no warning of the approach of said switch engine on the track, or failed to take proper precautions to ascertain whether the track was clear at the point where the accident occurred, for the reason that said Fred Huxoll had no duties to perform on or about the track at that point and the employes in charge of the engine had no reason to anticipate that said Fred Huxoll or any other employe would be on the track at that point."

29.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 47, which reads as follows:

"You are instructed that you cannot base a verdict against
885 the defendant in this case on the ground that it failed to have a lookout on the footboard of engine 213, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of the defendant to have a lookout so located on said engine."

30.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 40, which reads as follows:

"You are instructed that said Fred Huxoll assumed all risks and dangers incident to his work which were open and obvious even though such dangers and risks were the result of negligence on the part of the defendant, and that even if you should find that the defendant was negligent in some respects and that that negligence contributed to said Fred Huxoll's death, still you could not base your verdict against the defendant on such negligence if such negligence was known to said Fred Huxoll and the dangers to him from said negligence were open and obvious."

31.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 42, which reads as follows:

"You are instructed that the evidence fails to disclose any rule of the defendant company which required the presence of switchmen or other employes of the company upon the foot boards of the engines of defendant company, facing the direction in which the engine was moving, while operating in the yards of the defendant company, for the purpose of either warning persons of the approach of the engines, or for the purpose of signaling the engineer in

charge of the engine operating in the yards of the presence of any person upon the track over which the engine was moving."

32.

The court erred in holding that the trial court did not err in giving instructions 1, 2, and 3, wherein the court enumerated all of the charges of negligence contained in the amended petition, and told the jury that those charges of negligence, together with the allegations contained in defendant's answer and plaintiff's reply, constituted the issues which they were to try and determine.

886

33.

The court erred in holding that the trial court did not err in refusing the defendant's instruction No. 30, which reads as follows:

"You are instructed that the evidence in this case shows that the deceased, Fred Huxoll, was guilty of contributory negligence in going upon the main track, and that the Act of Congress under which this suit is brought provides that the damages suffered by the widow and children shall be diminished by the jury in proportion to the amount of such contributory negligence as compared with the negligence of the defendant, if any. In other words, if you should find and believe from the evidence that your verdict should be for the plaintiff you should first determine what amount would compensate the widow and children of such deceased for such death, taking into consideration such elements as you are told in other instructions it is proper for you to consider, and then if you believe that the negligence of said Fred Huxoll was as great as the negligence of the defendant, if any, and bore an equal part in producing his death, you should deduct from the amount which you find would compensate the widow and children one half of that amount and return the balance as your verdict in this case. If, on the other hand, you should find that such negligence of the deceased was not as great as that of the defendant, or was greater than that of the defendant, you should deduct less than half or more than half, depending on whether such negligence was greater or less."

34.

The court erred in holding that the trial court did not err in overruling the defendant's motion for a new trial.

35.

The court erred in holding that the trial court did not err in refusing to submit to the jury the special interrogatory requested by the defendant, which reads as follows:

"If you find for the plaintiff, then state what amount you deduct from the total damage on account of the contributory negligence if any of the deceased, Fred Huxoll. Ans. ——"

Wherefore, said Union Pacific Railroad Company prays for a reversal of the judgment of the District Court of Lancaster County, Nebraska, which was entered on October 23d, 1913, and also prays for a reversal of the judgment of affirmance entered by the Supreme Court of the State of Nebraska on December 23d, 1915, and that a judgment be rendered herein in favor of said Union Pacific
887 Railroad Company and for its costs.

UNION PACIFIC RAILROAD COMPANY,
By N. H. LOOMIS,
EDSON RICH,
B. W. SCANDRETT.
Its Attorneys.

888 [Endorsed:] In the Supreme Court of the State of Nebraska. Ella Huxoll, Administratrix of the estate of Fred J. Huxoll, deceased, Plaintiff and Appellee, vs. Union Pacific Railroad Company, Defendant and Appellant. General No. 18377. Assignment of Errors. Supreme Court of Nebraska. Filed Jan. 25, 1916. H. C. Lindsay, Clerk.

889 And on the same day there was also filed in the office of the clerk of said supreme court by said Union Pacific Railroad Company, its Petition for a Writ of Error, which said original Petition for a Writ of Error, together with its allowance, is hereto attached.

890 In the Supreme Court of the State of Nebraska.

General No. 18377.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Petition for Writ of Error.

To the Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska:

Your petitioner, Union Pacific Railroad Company, a corporation, respectfully represents that on January 11th, 1911, Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, brought a suit in the District Court of Lancaster County, Nebraska, under an Act of Congress commonly known as the Employers' Liability Act, which was approved April 22d, 1908, seeking to recover Fifty Thousand Dollars ($50,000.00) for the death of Fred J. Huxoll; that on October 23d, 1913, judgment was rendered in favor of the plaintiff, Ella Huxoll, and against the defendant, Union Pacific Railroad Company, for Twenty Thousand Dollars ($20,000.00); and that the defendant, Union Pacific Railroad Company, duly appealed

said case to the Supreme Court of the State of Nebraska, and the Supreme Court of the State of Nebraska on December 23d, 1915, rendered a final judgment against your petitioner in said case, affirming the judgment of the District Court of Lancaster County, Nebraska.

Your petitioner further shows that the Supreme Court of the state of Nebraska was at all the times mentioned herein, and is now the highest court in said state in which a decision of said cause could be had, and your petitioner further shows that in the above entitled action certain rights, privileges and *and* immunities under the constitution of the United States, and certain
891 rights, privileges and immunities under certain statutes of the United States were especially set up and claimed by your petitioner, and the decision of said Supreme Court of the State of Nebraska in said action was against said rights, privileges and immunities especially set up and claimed by your petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, your petitioner prays the allowance of a writ of error removing the records and proceedings in said suit to the Supreme Court of the United States for the correction of errors so complained of, and that a citation be issued directed to the said Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, defendant in error, for her due appearance in the said Supreme Court of the United States; and your petitioner further prays that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs, and that upon the giving of such bond as may be required, all further proceedings herein shall be suspended until the final determination of said writ of error by said Supreme Court of the United States.

UNION PACIFIC RAILROAD COMPANY,
By N. H. LOOMIS,
EDSON RICH,
B. W. SCANDRETT, *Its Attorneys.*

Writ of error and citation in the within named and above entitled cause allowed this 25th day of January, 1916.

A. M. MORRISSEY,
Chief Justice of the Supreme
Court of the State of Nebraska.

892 [Endorsed:] In the Supreme Court of the State of Nebraska. Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee, vs. Union Pacific Railroad Company, Defendant and Appellant. General No. 18377. Petition for Writ of Error. Supreme Court of Nebraska. Filed Jan. 25, 1916. H. C. Lindsay, Clerk.

893 In the Supreme Court of the State of Nebraska.

General No. 18377.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Order Allowing Writ of Error from the Supreme Court of the United States.

Let the writ of error issue upon the execution of a bond by the Union Pacific Railroad Company to said Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, in the sum of $30,000.00, said bond to operate as a supersedeas.

Dated at Lincoln, Nebraska, January 25, 1916.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of Nebraska.

894 [Endorsed:] In the Supreme Court of the State of Nebraska. Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee, vs. Union Pacific Railroad Company, Defendant and Appellant. General No. 18377. Order allowing writ of error from the Supreme Court of the United States. Supreme Court of Nebraska. Filed Jan. 25, 1916. H. C. Lindsay, Clerk.

895 And on the same day there was also filed in the office of the clerk of said supreme court by the said Union Pacific Railroad Company a Supersedeas Bond in the sum of Thirty Thousand ($30,000.00) Dollars, which said Supersedeas Bond was on said day duly approved by the Chief Justice of the supreme court of Nebraska, and copy of the said Bond with the approval thereof, is attached hereto.

896 Copy.

In the Supreme Court of the State of Nebraska.

General No. 18377.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Supersedeas Bond.

Know all men by these presents, That we, Union Pacific Railroad Company, as principal, and National Surety Company, as surety,

are held and firmly bound unto Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, in the full and just sum of Thirty Thousand Dollars, to be paid to the said Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, her certain attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, executors, administrators and assigns, jointly and severally by these presents, upon the following conditions:

Dated this 25th day of January, 1916.

Whereas, lately at a term of the Supreme Court of the State of Nebraska in a suit pending in said court between Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, as plaintiff and appellee, and Union Pacific Railroad Company, as defendant and appellant, a judgment was rendered against Union Pacific Railroad Company, and said Union Pacific Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, citing and admonishing her to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof.

Now, therefore, the condition of the above obligation is such, That if the said Union Pacific Railroad Company shall prosecute its said writ of error to effect, and answer all damages and
897 costs if it fail to make its plea good, then the above obligation to be void—otherwise, to remain in full force and effect.

UNION PACIFIC RAILROAD CO.,
Principal,

By EDSON RICH,
Its Agent and General Attorney.

[Seal National Surety Company, New York, incorporated 1897.]

NATIONAL SURETY COMPANY,
By MILLARD F. FUNKHOUSER,
Resident Vice President.

Attest:
HARRY L. MALTO,
Resident Assistant Secretary.

Copy.

Approved by—
A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

898 [Endorsed:] Copy. In the Supreme Court of the State of Nebraska. Ella Huxoll, Administratrix of The Estate of Fred J. Huxoll, deceased, Plaintiff and Appellee, vs. Union Pacific Railroad Company, Defendant and Appellant. General No. 18377. Supersedeas Bond. Supreme Court of Nebraska. Filed Jan. 25, 1916. H. C. Lindsay, Clerk.

899 And on the same day there was duly issued by the clerk of the district court of the United States for the District of Nebraska, a Writ of Error with the allowance thereof by the Chief Justice of the supreme court of the state of Nebraska, which said original Writ of Error with the allowance thereof, is hereto attached.

900 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Union Pacific Railroad Company, defendant and plaintiff in error, and Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased, plaintiff and defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission or authority; a manifest error hath happened to the great damage of the said Union Pacific Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and

901 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White Chief Justice of the

United States, the 25th day of January, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, District of Nebraska, Omaha Division.]

R. C. HOYT,
Clery of the District Court of the United States for the District of Nebraska.

Allowed by—
A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

902 [Endorsed:] In the Supreme Court of the United States. Union Pacific Railroad Co[illegible]ny, Plaintiff in Error, vs. Ella Huxoll, Administratrix of the [illegible]state of Fred J. Huxoll, Deceased, Defendant in Error. Writ of Error. Supreme Court of Nebraska. Filed Jan. 25, 1916. H. L. Lindsay, Clerk.

903 And on the same day there was issued by the Chief Justice of the supreme court of the state of Nebraska a Citation, which original Citation with service thereof accepted, was on the 27th day of January, 1916, duly returned to the said supreme court of Nebraska and filed in the office of the clerk of said court. Said original Citation with service thereof endorsed thereon, is hereto attached.

904 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Ella Huxoll, Administratrix of the estate of Fred J. Huxoll, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Nebraska, wherein Union Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska, this 25th day of January, in the year of our Lord one thousand nine hundred and sixteen.

[Seal, Supreme Court of Nebraska.]

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

Attest:
H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

Service of the within citation is hereby accepted this 26th day of January, A. D., 1916.

WALTER V. HOAGLAND,
W. B. COMSTOCK,
STOUT, ROSE & WELLS,
HALLECK F. ROSE,
Attorneys for Defendant in Error.

905 [Endorsed:] 18377. In the Supreme Court of the United States. Union Pacific Railroad Company, Plaintiff in Error, vs. Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Defendant in Error. Supreme Court of Nebraska. Filed Jan. 27, 1916. H. C. Lindsay, Clerk. Citation.

906 And on the said 27th day of January, 1916, there was filed in the office of the clerk of said supreme court a certain stipulation in reference to the use of the exhibits used in the trial of said cause in said supreme court, which said stipulation was on said day duly allowed by said supreme court. Said original stipulation with the allowance thereof endorsed therein is hereto attached.

907 In the Supreme Court of the State of Nebraska.

General No. 18377.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Stipulation Regarding Use of Exhibits.

It is hereby stipulated and agreed that all of the exhibits used in the trial of the above entitled cause, and now attached to the record in the Supreme Court of the State or Nebraska, may be incorporated in the transcript of record to be transmitted to the Supreme Court of the United States and that copies of said exhibits may be attached to the printed record to be used in said court.

Dated this 26th day of January, 1916.

N. H. LOOMIS,
EDSON RICH,
B. W. SCANDRETT,
Attorneys and Counsel for Union Pacific Railroad Company, Appellant in the Supreme Court of Nebraska, and Plaintiff in Error in the Supreme Court of the United States.

WALTER V. HOAGLAND,
WILMER B. COMSTOCK,
JOHN F. STOUT,
AUTHUR R. WELLS AND
HALLECK F. ROSE,
Attorneys and Counsel for Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Appellee in the Supreme Court of Nebraska, and Defendant in Error in the Supreme Court of the United States.

Allowed January 27th 1916.

A. M. MORRISSEY,
Chief Justice.

[Seal Supreme Court of Nebraska.]

Attest:
H. C. LINDSAY, *Clerk.*

908 [Endorsed:] 18377. In the Supreme Court of the State of Nebraska. Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, deceased, Plaintiff and Appellee, vs. Union Pacific Railroad Company, Defendant and Appellant. General No. 18377. Stipulation Regarding Use of Exhibits. Supreme Court of Nebraska. Filed Jan. 27 1916. H. C. Lindsay, Clerk.

909 And on the said 27th day of January, 1916, there was filed in the office of the clerk of said supreme court of Nebraska by the said Union Pacific Railroad Company, a Præcipe for for Transcript of Record on Writ of Error from the United States supreme court in said case, with acceptance of service thereof endorsed thereon, which said original Præcipe with acceptance of service thereof, is attached hereto.

910 In the Supreme Court of the State of Nebraska.

General No. 18377.

ELLA HUXOLL, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee,
vs.
UNION PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Præcipe for Transcript of Record on Writ of Error from the United States Supreme Court.

In accordance with Rule 8 of the Supreme Court of the United States, Union Pacific Railroad Company, defendant and appellant in the Supreme Court of the State of Nebraska, files this its præcipe,

indicating the record to be incorporated in the transcript thereof for consideration by the Supreme Court of the United States on said writ of error, to-wit:

1. Complete record of the trial court, including final judgment, bill of exceptions, appeal orders, and appeal bond.

2. Complete record of the Supreme Court of Nebraska, including all proceedings in that court, assignment of errors in that court, opinion of the court, and final judgment.

3. All proceedings in the Supreme Court of Nebraska, subsequent to final judgment, including original petition for writ of error, original assignment of errors, original order allowing writ of error, original writ of error, original citation, copy of supersedeas bond, original stipulation regarding exhibits, and this præcipe, together with all orders and other proceedngs relating to said writ of error from the Supreme Court of the United States to said Supreme Court of Nebraska.

N. H. LOOMIS,
EDSON RICH,
B. W. SCANDRETT,
Attorneys for Union Pacific Railroad Company, Plaintiff in Error in Supreme Court of United States.

911 The undersigned, attorneys and counsel for the appellee in the Supreme Court of Nebraska, who is defendant in error in the Supreme Court of the United States, acknowledged service of a copy of the foregoing præcipe this 26th day of January, A. D., 1916.

WALTER V. HOAGLAND,
W. B. COMSTOCK,
JOHN F. STOUT,
AUTHUR R. WELLS AND
HALLECK F. ROSE,
Attorneys and Counsel for Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Appellee in the Supreme Court of Nebraska, who is Defendant in Error in the Supreme Court of the United States.

912 [Endorsed:] In the Supreme Court of the State or Nebraska. Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee, vs. Union Pacific Railroad Company, Defendant and Appellant. General No. 18377. Præcipe for Transcript of Record on Writ of Error from the United States Supreme Court. Supreme Court of Nebraska. Filed Jan. 27 1916. H. C. Lindsay, Clerk.

913 *Certificate of Lodgement.*

SUPREME COURT OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of said Court, do certify that there was lodged with me as such clerk on January 25, 1916, in the matter of Union Pacific Railroad Company, plaintiff in error, vs. Ella Huxoll, Administratrix, defendant in error:

1. The original bond of which a copy is herein set forth.
2. Two copies of writ of error as herein set forth, one for Ella Huxoll, defendant in error, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office at Lincoln, Nebraska, this 14th day of February, 1916.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of The State of Nebraska.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 2/14/16. H. C. L.]

914 [Endorsed:] In the Supreme Court of the State of Nebraska. Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, Deceased, Plaintiff and Appellee, vs. Union Pacific Railroad Company, Defendant and Appellant. Certificate of Lodgement.

915 SUPREME COURT,
State of Nebraska, ss:

Authentication of Record.

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 875, inclusive, are a true, full and complete transcript of the record and proceedings in the case of Ella Huxoll, Administratrix of the Estate of Fred J. Huxoll, deceased, plaintiff and appellee, v. Union Pacific Railroad Company, defendant and appellant, No. 18377, and also of the opinion of the court rendered therein as the same now appear on file in my office.

And I further certify that the original assignment of errors, original petition for writ of error, original order allowing writ of error, original writ of error, original citation, original stipulation regarding exhibits and original præcipe for transcript which were duly filed herein in said supreme court, are attached hereto, and that a copy of the original supersedeas bond filed herein is attached hereto.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of said court at my office in Lincoln, Nebraska, this February 14th, 1916.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk, Supreme Court of Nebraska.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 2/14/16. H. C. L.]

916 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case. together with all things concerning the same.

In Witness Whereof, I have hereunto subscribed my name, and affixed the seal of said supreme court of Nebraska, in the city of Lincoln, this February, 14th, 1916.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk, Supreme Court of Nebraska.

Fees:	
Costs of this transcript.....	$215.00
3 certificates, seals, & stamps.....	1.80
Binding record	1.00
	$217.80

Paid by Union Pacific R. Co.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 2/14/16. H. C. L.]

Endorsed on cover: File No. 25,141. Nebraska, Supreme Court. Term No. 384. Union Pacific Railroad Company, plaintiff in error, vs. Ella Huxoll, administratrix of the estate of Fred J. Huxoll, deceased. Filed February 18th, 1916. File No. 25,141.

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Supreme Court of the United States

October Term, 1916.

No. 384.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
ELLA HUXOLL, ADMINISTRATRIX OF THE ESTATE OF FRED J. HUXOLL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF PLAINTIFF IN ERROR

STATEMENT.

The defendant in error, as administratrix of the estate of her husband, Fred J. Huxoll, deceased, sued the plaintiff in error in the District Court of Lancaster County, Nebraska for the benefit of herself and her two infant children to recover $50,000 damages alleged to have been suffered by the death of Fred J. Huxoll.

On January 1st, 1911, Fred J. Huxoll, employed by the defendant Railroad Company as an engineer, while on his way from the wash house in the Sidney yards to his engine which was located on the spot track, was run over and killed by an engine which was proceeding westward on the main line. At the trial in the District Court the jury returned

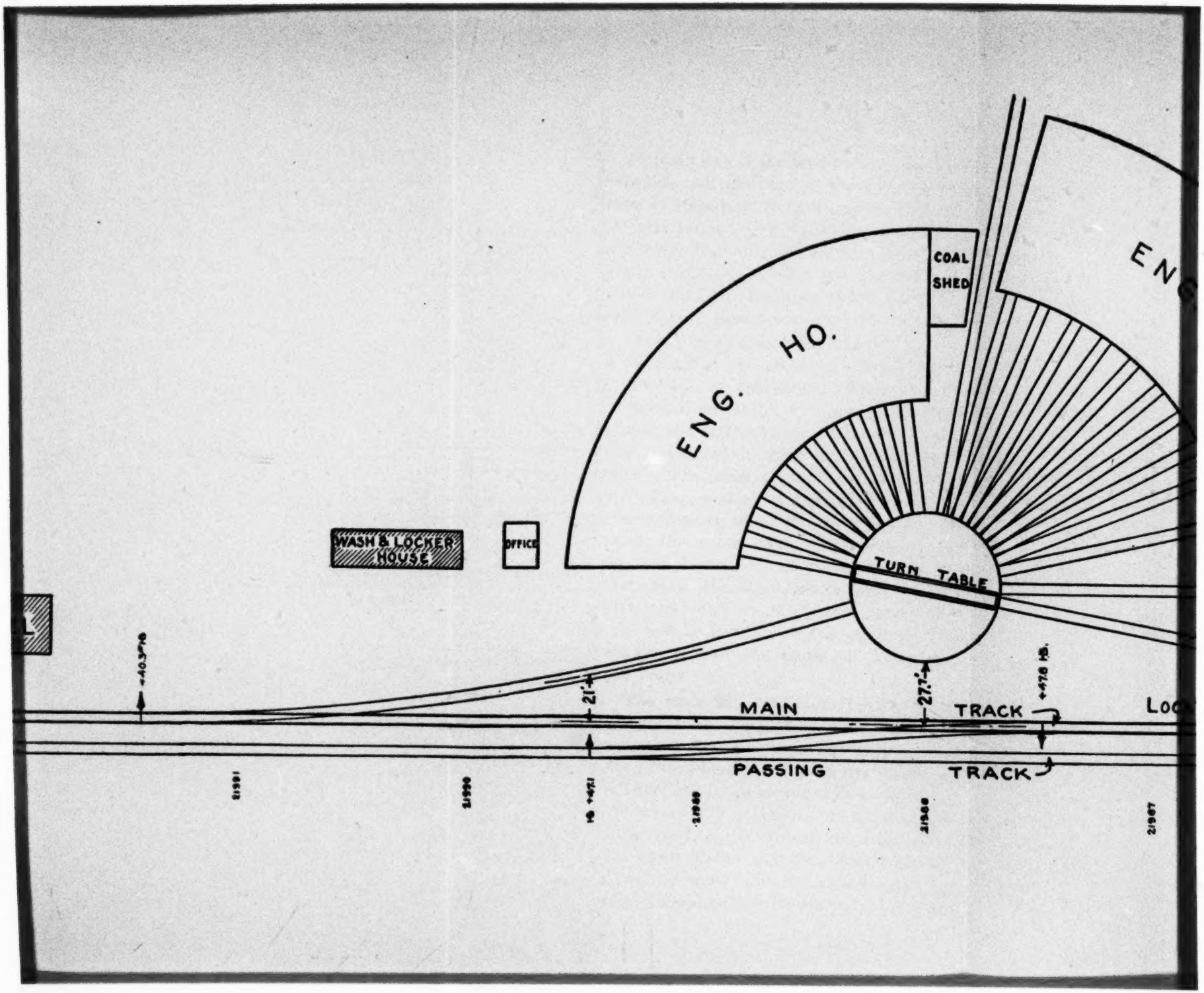
a verdict in favor of the plaintiff for $20,000. Defendant duly filed a motion for a new trial which was overruled and an appeal was taken to the Supreme Court of the State of Nebraska That Court on December 23d, 1915, affirmed the judgment of the District Court. (R. 648) To reverse the judgments of the District and Supreme Courts of the State of Nebraska the present writ of error is prosecuted.

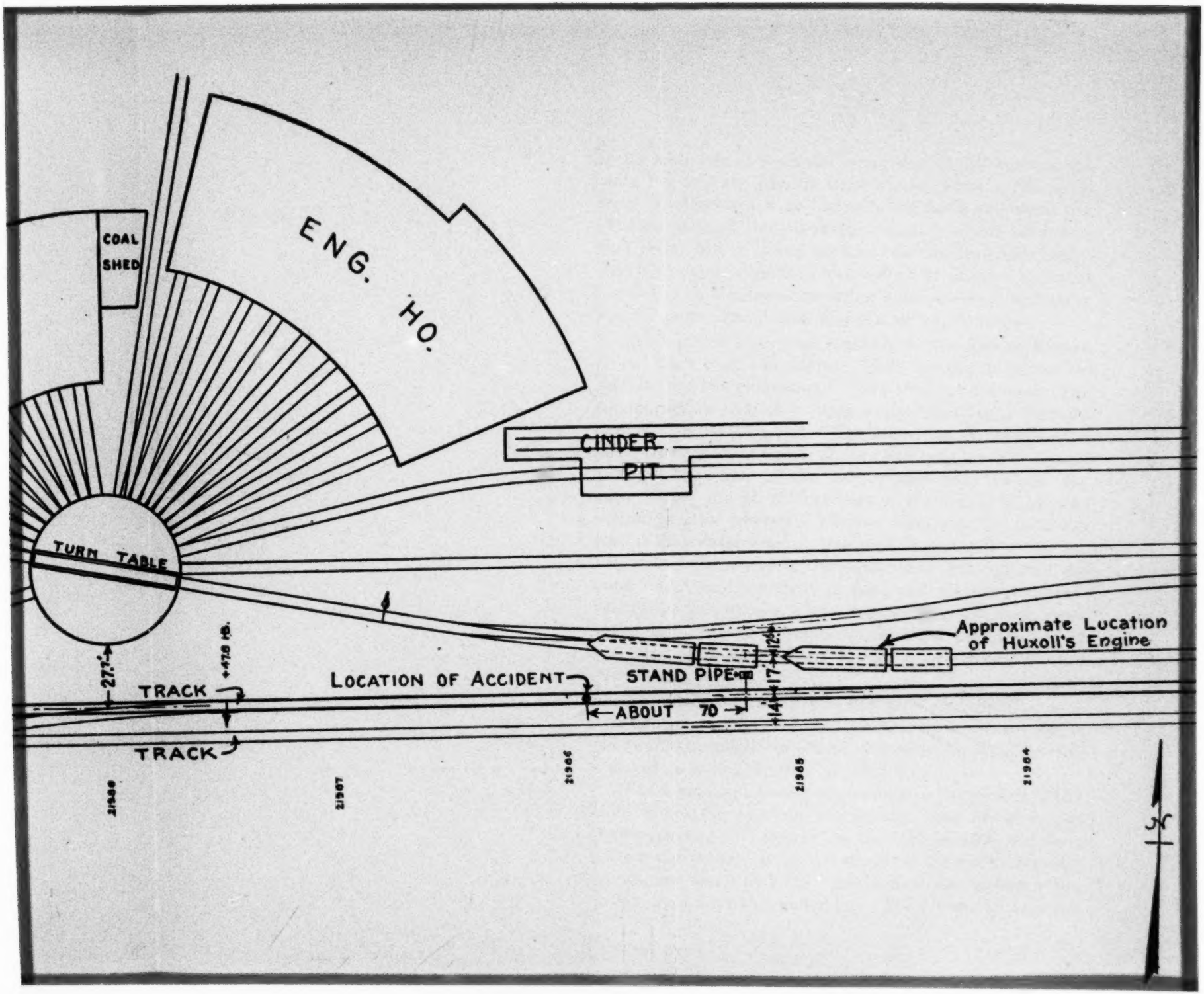
We desire first to explain the relative locations of the various buildings and tracks involved in this accident, and believe the members of the court will have a clearer understanding of the situation if they refer to Exhibit 4 which appears at page 608 of the record, a copy of which is set out herein.

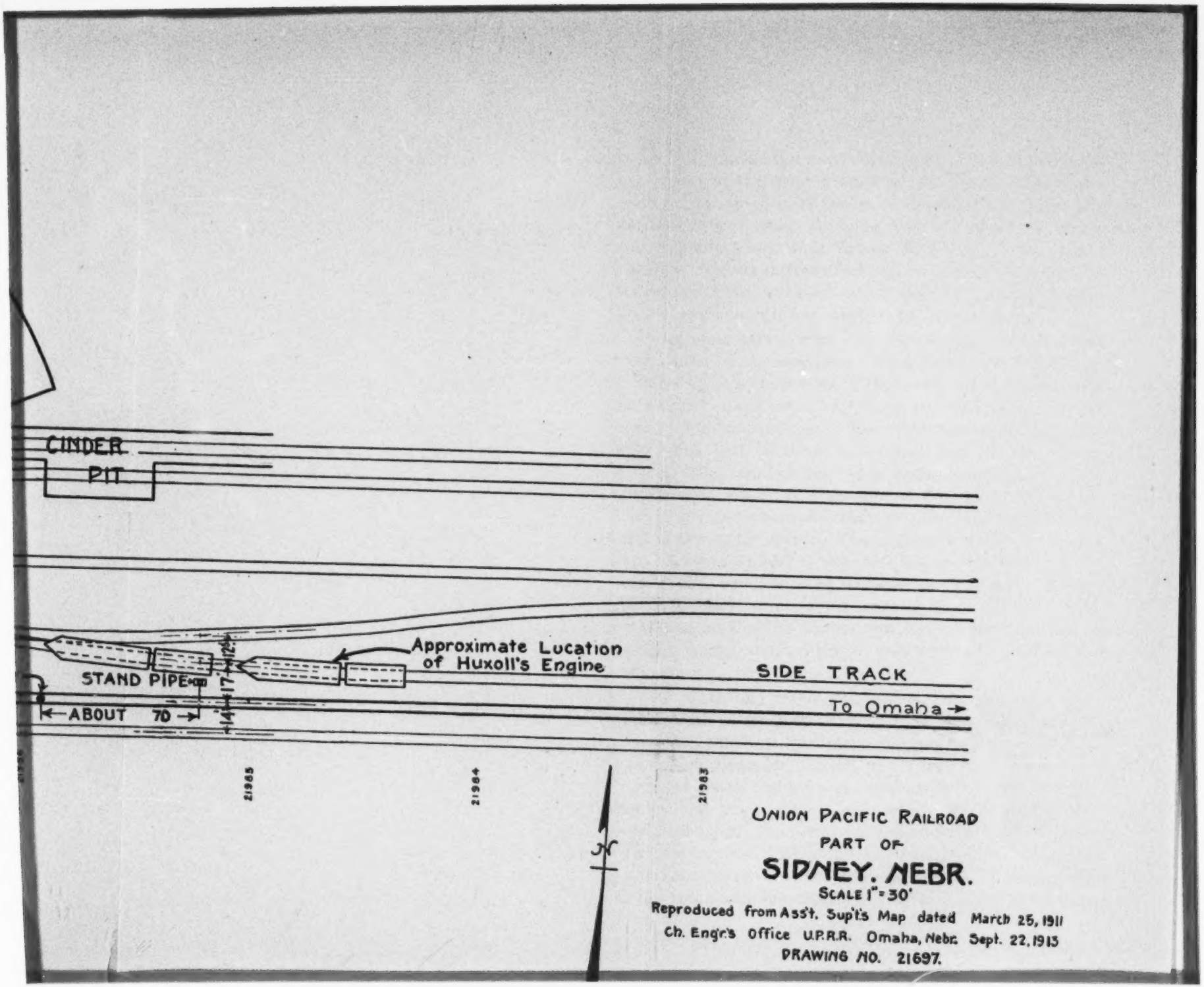
Sidney, Nebraska, where this accident occurred, is a division point on the line of the defendant, Union Pacific Railroad Company. At the time this accident occurred there were two roundhouses both of which were located north of the main line track. Between these roundhouses and the main line track was a turntable which was 27.7 feet from the main line. Immediately west of the roundhouses were two buildings, one an office building and the other a wash room and locker house. The wash house was 62½ feet north of the main line track and there was only one track between the wash house and the main line track, and that was a track known as the west spot track which leads from the main line track up to the truntable. There was also another track which ran east from the turntable and parallel with the main line for some distance. This track was known as the east spot track. In between this east spot track and the main line is a water crane which is referred to on Exhibit 4 as standpipe. This water crane is 275 feet east of a point on the main line directly south of the turntable, and is also 244 feet from the turntable and 525 feet from the wash house. It is 12 feet from the spot track

PACIFIC

←To Ogden


ENG. HO.
COAL SHED
ENG
WASH & LOCKER HOUSE
OFFICE
TURN TABLE
MAIN TRACK
PASSING TRACK
21'
27.7'
+478 HS.
LOC


COAL SHED
ENG. HO.
CINDER PIT
TURN TABLE
Approximate Lucation of Huxoll's Engine
27'-
+478 HO.
TRACK
LOCATION OF ACCIDENT
STAND PIPE
ABOUT 70
17'-
12'-
14'-
TRACK
21966
21965
21964



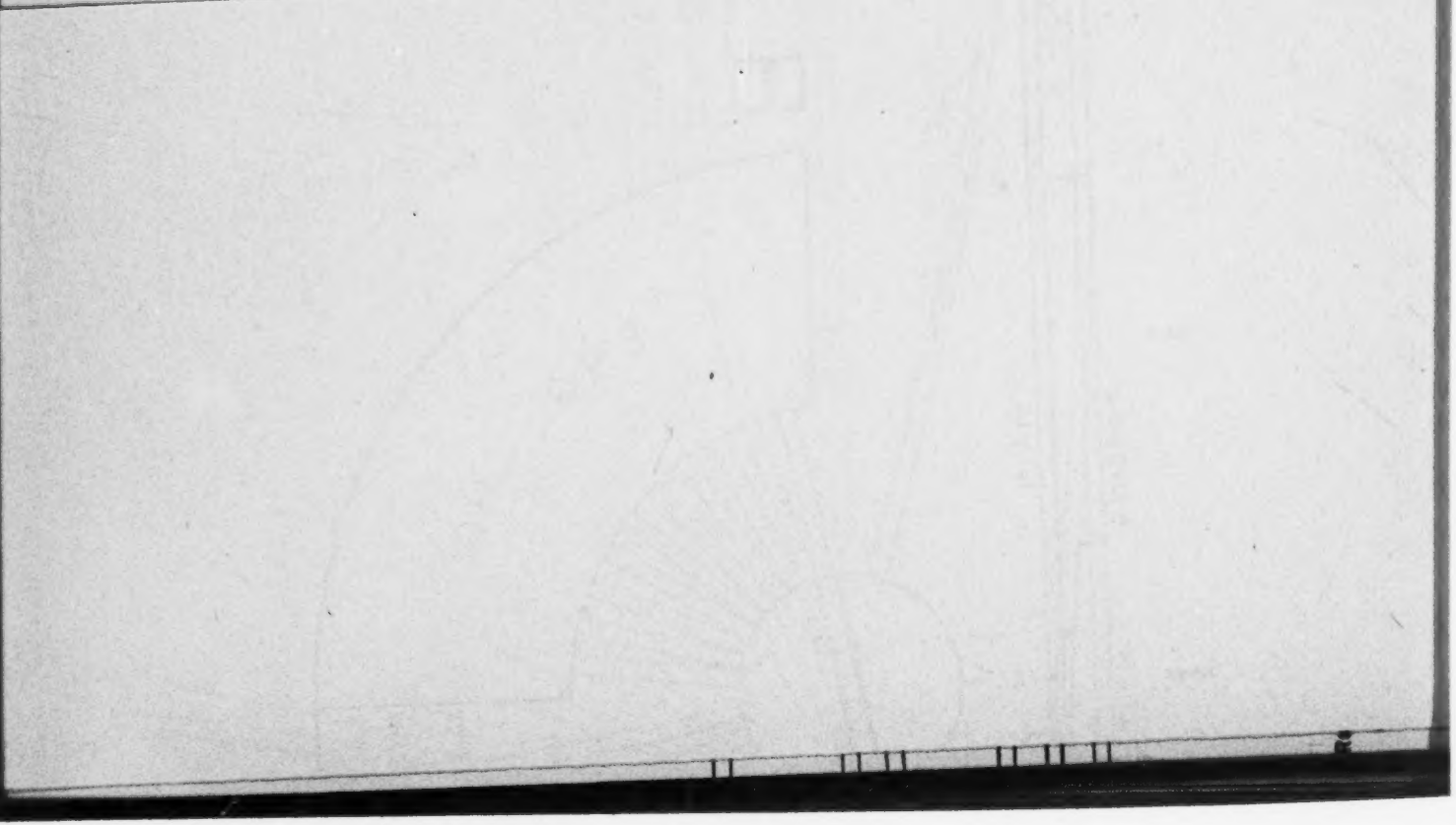
UNION PACIFIC RAILROAD

PART OF

SIDNEY. NEBR.

SCALE 1" = 30'

Reproduced from Ass't. Sup't's Map dated March 25, 1911
Ch. Engr's Office U.P.R.R. Omaha, Nebr. Sept. 22, 1913
DRAWING NO. 21697.



to the main line at the water crane, and 14 feet between the main line and the passing track at this point. The water crane or standpipe is 12 inches in diameter and there is a platform around this standpipe which is about six inches high, seven feet wide and thirteen feet and six inches long—that is, it extends thirteen feet and six inches east and west parallel with the track on either side, the west end being slightly more than 6 feet west of the water crane.

Two locomotives were standing on the east spot track at the time of the accident. Their location is shown on exhibit 4 by two characters. They were headed west. The one marked on exhibit 4 "approximate location of Huxoll's engine" was farthest east. The other was standing on the same track just in front of, or just west of the Huxoll engine. The tank of the west engine was opposite the water crane, and all of that part of the engine which was in front of place where the water is taken into the tank was west of the water crane. The engines were 70 or 75 feet long. As the rear end of the west engine was opposite the water crane, and the front or head end was 50 or 60 feet west of the water crane, a person going from the wash house to the east or Huxoll's engine would reach the head end of the west engine about 50 or 60 feet before he reached the water crane.

The main line track was not used by employes as a thoroughfare or footpath, and there is no evidence that it was or that employes or others ever went on themaintrack at the place where Mr. Huxoll was killed.

There are no highways or crossings in the portion of the yards where the accident happened. Rose Street is the nearest crossing. It crosses the track about 1000 feet west of the water crane. Exhibit 4 shows all the tracks between the passing track and the roundhouses and between the passing track and the cinder pit. The ground in between

these tracks and around the various buildings shown on Exhibit 4 was covered with what is known as Sherman Hill gravel, which is the same gravel used by the Union Pacific for all its station platforms and for ballasting its track.

The petition under which this case was tried stated that the defendant was liable to the plaintiff under an Act of Congress approved April 22d, 1908, and entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employes in certain Cases." The petition also alleged in substance that Huxoll at about noon on the first day of January, 1911, was ordered by the defendant to proceed to a point adjacent to the main track and in near proximity to the water crane in the yards at Sidney, to take charge of and operate one of the defendant's locomotives eastward from the station of Sidney to a siding called Perdue for the purpose of moving from Perdue to Sidney a freight train carrying interstate traffic, which had been stalled at Perdue; that pursuant to this order, Huxoll proceeded to the wash house and from that point "by the usual route" to the water crane "through a violent snowstorm, high wind and excessively cold weather." It is then alleged that the defendant had negligently permitted an accumulation of ice about the water crane "*making it necessary for deceased's own safety to make a slight detour in his course and to cross on to the defendant's main line track;*" that the plaintiff's whole course was "enveloped in dark clouds of smoke and steam" which the defendant negligently permitted to escape from the roundhouse which was negligently located too near the main track and water crane, and that by reason of this smoke and steam the deceased "was unable to see or distinguish the approach or movement of engines and cars for any appreciable distance;" that while the deceased was passing around the ice at said water crane the defendant without warning backed an ordinary road engine upon and

over him, causing injuries from which he died on the following day; that said engine was operated at a high and dangerous rate of speed without any brake, the brake thereon being broken; without any bell, the bell thereon being broken; and with a curtain covering the cab window so as to prevent those in charge of the engine from seeing persons in front thereof.

In addition to the foregoing charges of negligence, the petition specifically alleged that the defendant was negligent in using a road engine in switching service instead of an ordinary switch engine; that this road engine had a high and wide tank instead of a sloping tank such as is ordinarily used on switch engines; that it had no foot boards while the ordinary switch engine has foot boards at each end which will permit an employe to ride on the leading end for the purpose of giving warning; that safety required that there be a man on the foot board of the leading end of the engine and that this was a common practice in the Sidney yards, but that there was no one stationed on the leading end of the engine which struck Huxoll; and that in switching in the yards at Sidney the safety of the employes required, and it was the practice to so operate the engine as to be able to stop within the distance that the track was seen to be clear, but that the engine which struck Huxoll was not so operated.

The answer of the defendant to this petition admitted the formal allegations of the petition; that the defendant was engaged in interstate commerce, and that Fred Huxoll died as a result of injuries received on the day in question. The answer also alleged in separate paragraphs that said injuries were caused by the negligence of deceased and that the deceased assumed the risk of being injured in the manner he was injured.

At the conclusion of all the evidence defendant requested the trial court to instruct the jury to return a ver-

dict in its favor, and at the same time by separate instructions specifically requested the court to withdraw certain charges of negligence from the consideration of the jury. In addition to these and other requests, the defendant also requested the trial court to instruct the jury that there was no evidence which would justify them in finding that any violation of the Federal Safety Appliance Act contributed to the death of Fred J. Huxoll. These requests were all refused and in addition to submitting the charges of negligence contained in the petition to the jury, the trial judge specifically told the jury that if they found that a violation of the Federal Safety Appliance Act contributed to the death of said Fred J. Huxoll, they could deduct nothing for contributory negligence and could not consider the defense of assumption of risk. Complaint was made of these rulings in a motion for a new trial duly filed, which motion was overruled by the trial court, and the rulings were assigned as error in the Supreme Court of the State of Nebraska, but that court also refused to set aside the judgment or correct the errors complained of.

The citation for the opinion rendered by the Supreme Court of Nebraska is *Huxoll vs. Union Pacific*, 155 N. W. 900. The same may also be found at page 648 of the record.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing the defendant's instruction No. 1 which reads as follows:

> "You are instructed to return a verdict in favor of the defendant." (Record p. 27)

2. The Supreme Court of Nebraska erred in holding that there was sufficient evidence introduced at the trial to sustain a verdict of the jury in favor of the plaintiff and against the defendant.

3. The Supreme Court of Nebraska erred in holding that the evidence introduced in the trial of this case would not justify the jury in finding that Fred J. Huxoll assumed the risk of being killed in the manner he was killed.

4. The Supreme Court of Nebraska erred in holding that there was no evidence in this case which would justify submission to the jury of the defense of assumption of risk.

5. The Supreme Court of Nebraska erred in holding that the trial court did not err in submitting to the jury the question as to whether or not the condition of the brakes on the engine which ran over Fred J. Huxoll contributed to the death of said Fred J. Huxoll.

6. The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing the defendant's instruction No. 14 which reads as follows:

> "You are instructed that there is no evidence in this case tending to show that there was a general custom in vogue in the yards at Sidney, of having a switchman on the forward end of a switch engine for the purpose of keeping a lookout and warning the engineer and those upon the track of the presence of danger and that you cannot find a verdict against the defendant on the ground that such a custom did exist and was not being followed by the defendant at the time Huxoll received the injuries which resulted in his death." (Record p. 30)

7. The supreme Court of Nebraska erred in holding that the trial court did not err in refusing the defendant's instruction No. 47 which reads as follows:

> "You are instructed that you cannot base a verdict against the defendant in this case on the ground that it failed to have a lookout on the foot board of engine 213, for the reason that there is no evidence in

this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of the defendant to have a lookout so located on said engine." (Record p. 39).

8. The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing the defendant's instruction No. 22 which reads as follows:

"You are instructed that habits or customs of the defendant's employes, such as brakemen, switchmen or others of riding on the foot board of its engines, and facing the direction in which the engine was moving, if any such habit or custom you believe from the evidence to have existed, would not be binding on the defendant company so long as such habits were for their own convenience and were nor required by the defendant company for the purpose of warning employes or others from the track." (Record p. 32).

9. The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing the defendant's instruction No. 6 which reads as follows:

"You are instructed that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of the defendant to comply with any Act of Congress enacted for the safety of employes." (Record p. 28)

10. The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing the defendant's instruction No. 17 which reads as follows:

"You are instructed that you cannot base a verdict against the defendant on the ground that the brakes

on engine 213 were out of repair, broken, or not in working order, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the failure of engine 213 to stop sooner than it did after the engineer was given the signal to stop." (Record p. 31).

11. The Supreme Court of Nebraska erred in holding that the trial court did not err in giving instruction No. 12 which reads as follows:

"The evidence shows, without dispute that the railroad of the defendant, of which the yard at Sidney, where the accident in question occurred is a part of a highway of interstate commerce, and that defendant's road engine No. 213, which collided with deceased, Fred J. Huxoll, was an engine which the defendant used in hauling interstate commerce. An act of Congress required that such engines be equipped with a power driving wheel brake so that the engineer can control its speed without requiring the use of a common hand brake. The act of Congress under which this suit is prosecuted, making carriers by railroads while engaged in interstate commerce responsible for injury or death to an employe resulting in whole or in part from negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed or other equipment, provides, among other things that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence or to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employes contributed to the

injury or death of such employe. If you find from the evidence that the death of Fred J. Huxoll resulted in whole or in part from the negligence of any of the officers, agents, or employes of the defendant, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed or other equipment, alleged or charged in the petition and that the power brake of defendant's road engine No. 213 was not at the time of the accident in working order and could not then be used by the engineer on such locomotive to control its speed, and the fact that such power brake was not in working order and could not be used by the engineer to control the speed of the engine, contributed to the death of Fred J. Huxoll, then the law is that the deceased, Fred J. Huxoll, cannot be held either to have been guilty of contributory negligence or to have assumed the risks of his employment." (Record p. 45).

12. The Supreme Court of Nebraska erred in holding that the trial court did not err in giving instruction No. 16 which reads as follows:

"The law is that a servant by his contract or employment, assumes the ordinary risks and dangers incident to his employment but in this case the deceased, Fred J. Huxoll, cannot be held to have assumed the risks of his employment if you find that the power driving wheel brake on defendant's engine No. 213 with which he collided, was not at the time of the accident in working condition, and that fact contributed to his death. The ordinary risks and dangers of a servant's employment assumed by him as a matter of law do not include risks and dangers due to the master's negligence unless such risks and dangers are actually

known to the servant or are open and obvious." (Record p. 47).

13. The Supreme Court of Nebraska erred in holding that the trial court did not err in giving instruction No. 13, which reads as follows:

"Among the allegations of the petition are the averments that in defendant's switching operations and particularly in its yard at Sidney, the safety of its employes and servants in and about the yards and of those called there for any special service required a brakeman or servant to be stationed on the leading end of the head car or engine for the purpose of keeping a lookout and warning the engineer and those upon the track of the presence of danger by collision or otherwise in time to be able to stop the engine or cars before colliding with any servant within the yard and that in general and common practice a brakeman or servant was so stationed for that purpose. The petition charges that in the movement of the engine which inflicted the fatal injuries complained of, no brakeman or other servant was placed at the rear or leading end of the engine to keep a lookout ahead and that no foot board or other place of rest was provided on said engine for that purpose, as is provided by locomotive engines in common use in the switching service, and that the defendant negligently and carelessly failed to so station a servant to keep a lookout or to provide an engine suitably equipped therefor. If you find from the evidence that it was the custom of the defendant railroad company, at that time, to have a man stationed on the footboard on the leading end of the engine or cars as a lookout, and that the defendant was guilty of negligence in failing to so

station a man as a lookout, and that the death of Fred J. Huxoll resulted, in whole or in part, from such negligence, then the plaintiff would be entitled to recover in this action." (Record p. 46).

14. The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing the defendant's instruction No. 15 which reads as follows:

> "You are instructed that you cannot find a verdict against the defendant on the ground that engine 213 was being negligently operated at a high and dangerous rate of speed at the time that it struck the deceased Fred Huxoll, for the reason that there is no evidence in this case tending to show that Fred Huxoll's death was caused in whole or in part by the operation of said engine at a high and dangerous rate of speed, even though you should find that said engine was in fact being operated at a high and dangerous rate of speed." (Record p. 30).

15. The Supreme Court of Nebraska erred in holding that the trial court did not err in refusing the defendant's instruction No. 21 which reads as follows:

> "You are instructed that you cannot base a verdict against the defendant in this case on the ground that the defendant gave no warning of the approach of said switch engine on the track or failed to take proper precautions to ascertain whether the track was clear at the point where the accident occurred, for the reason that said Fred Huxoll had no duties to perform on or about the track at that point and the employes in charge of the engine had no reason to anticipate that said Fred Huxoll or any other employe would be on the track at that point." (Record p. 31).

16. The Supreme Court of Nebraska erred in holding that the trail court did not err in giving instruction No. 4, (Record p. 43) which reads as follows:

> "You are instructed that the burden of proof in this case is upon the plaintiff to prove by a preponderance of the evidence all the material allegations in her petition. That is to say, that at the time of the accident alleged the defendant was guilty of negligence, as stated in the first paragraph of these instructions, that as the proximate result of such negligence the plaintiff's intestate was fatally injured and died as a result of said injuries so received as alleged in the first paragraph of these instructions; and that by reason of said injuries resulting in death of deceased the plaintiff has been damaged, as alleged in the first paragraph of these instructions; and the amount of such damages. When the plaintiff has shown these facts then the burden of proof is upon the defendant to prove by a preponderance of the evidence the allegations of its answer constituting its defense to plaintiff's action. That is to say, that any injuries received by plaintiff were the proximate result of his own negligence or that his own negligence contributed thereto, unless the plaintiff's own testimony shows that the deceased Fred J. Huxoll was guilty of negligence at the time of the accident.

17. The Supreme Court of Nebraska erred in holding that the trial court did not err in overruling the defendants' motion for a new trial. (Record p. 57).

18. The Supreme Court of Nebraska erred in affirming the judgment of the District Court of Lancaster County, Nebraska, in favor of the plaintiff and against the defendant.

ARGUMENT.

I.

THE COURT ERRED IN OVERRULING DEFENDANT'S REQUEST FOR AN INSTRUCTED VERDICT.

The first question which we desire to present is, whether the plaintiff in error was entitled to an instructed verdict. (Record p. 27, Ante P. 6).

It claims that it was, *first*, because there was no proof of negligence on its part towards Mr. Huxoll; *second*, because, under the undisputed proof, Mr. Huxoll's own reckless act of going upon the track when he could have as well remained on the broad gravel walk provided for him was the proximate cause of his injury, and not the acts charged as negligence in the petition; and *third*, because Mr. Huxoll assumed the risk.

Whether there was a question for the jury, is a question of law, and in this case a Federal question, and since the Supreme Court of Nebraska decided it, it is incumbent upon this court to review that decision.

Chesapeake & Ohio vs. De Atley, 241 U. S. 310, 317.

Ry. Co. vs. White, 238 U. S. 507.

The action is based on negligence only. The Act of Congress excludes "responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence."

Seaboard Air Line vs. Horton, 233 U. S. 492:

The charges of negligence contained in the petition have been referred to in the foregoing statement. It is conceded that a number of these charges were not proven, and although the evidence showed that the roundhouse was located substantially as alleged in the petition, and that "the smoke and steam incident to its maintenance and operation enveloped and obscured" engines and cars passing to and fro

on the main line and sidings, and although it was admitted at the trial that the engine that ran over and killed Mr. Huxoll was an ordinary road engine and that it had a tank such as is ordinarily used on that type of engines instead of a tank such as is ordinarily used on switch engines, it is not contended that there was any evidence tending to show that the defendant was negligent in these particulars and these allegations of negligence may be dismissed without further comment. (See Instruction 15, Record, p. 47)

The remaining charges of negligence, namely: that the defendant negligently permitted an accumulation of ice about the water crane "making it necessary for the deceased's own safety to make a slight detour in his course and to cross on to defendant's main line track," and that while he was so on the track going around the ice at the water crane the defendant without warning backed an engine over him at a high and dangerous rate of speed without any lookout and without any brake or bell on the engine, can best be considered in connection with the evidence by which the plaintiff claims they are proven. Later on we will review this evidence at length for the convenience of the Court, but before doing so will refer briefly to the undisputed facts and to our position in regard to some of the legal questions involved so that the Court may have them in mind when considering the evidence.

The undisputed evidence and admissions of the parties show that the accident occurred in broad day light on the main line track of the defendant in a busy railroad yard; that at the time and place of accident this track was enveloped in a dense cloud of steam and smoke; that the track was not made and intended as a footpath for Mr. Huxoll or others, but that it was made, intended and used constantly by the defendant for the operation of its trains, engines and cars; that the engine which ran over and killed Mr.

Huxoll was an ordinary road engine and that it was running backwards at the tine of the accident; that engines of this type, as well as switch engines, cars and trains of all kinds were operated backwards and forwards on this main line track by the defendant in carrying on its business; that the defendant had provided a smooth gravel walk 12 feet wide in its narrowest place for the use of Mr. Huxoll and others in going from the wash house to the spot track where Mr. Huxoll expected to find his engine; that this walk was not obstructed with ice or anything else; that Mr. Huxoll was run over before he reached the water crane, and that he did not leave the walk to avoid ice at the water crane as charged in the petition, but that he needlessly and recklessly went on the track; that when Mr. Huxoll stepped upon the track he knew the use that was made of it by the defendant and knew that he was making a use of it for which it was never intended and for which he possessed no right or privilege and which he knew was dangerous. While there was a dispute about the *condition* of the brakes, the undisputed evidence showed that Mr. Huxoll was run over before he was discovered on the track and the alleged failure of the brakes to work properly did not in any way contribute to the accident.

One witness, Mr. Matthews, a discharged employe, testified that the bell on the engine was not ringing. (His testimony was contradicted by a large number of witnesses and its credibility will be discussed hereafter.) There was no one riding on the foot-board of the engine and no one was sent on foot ahead of the engine as a lookout, but there was no evidence tending to show that the defendant owed Mr. Huxoll any duty to ring the bell, blow the whistle, station a man on the foot-board, or to send a man on foot ahead of the engine, and there was no evidence whatever

tending to show that its failure to do either or all of the above acts constituted negligence towards Mr. Huxoll.

We will concede for the purposes of argument that the bell was not rung; that the whistle was not bolwn; that there was no one riding on the foot-board of the engine; that no one was sent on foot ahead of it, and that the brakes were out of order.

This brings us to the legal question whether the Railroad Company was required, under the circumstances shown by the evidence, to blow the whistle, ring the bell, station a man on the foot-board, and send a flagman ahead of the engine to prevent Mr. Huxoll from going on the main line track at a place where he had no duties to perform and where neither he nor others had any right to be. It also presents the legal questions whether the acts charged as negligence, or either of them, were the proximate cause of the accident, and whether Mr. Huxoll assumed the risk.

THE ACCIDENT WAS NOT DUE TO NEGLIGENCE ON THE PART OF THE DEFENDANT, BUT TO MR. HUXOLL'S FAILURE TO EXERCISE ANY CARE FOR HIS OWN PROTECTION.

"Where there is nothing to extenuate the negligence of the employe, or to confuse his judgment, and his duty is as clear as its performance is easy, and he knows not only the imminent danger of the situation, but also how it can be averted by complying with the rules of the employer, there is no justification for a comparison of negligences on the part of the employer and employe or the apportioning of their effect under the provision of the Employers' Liability Act. To excuse such neglect on the part of an employe of an interstate carrier would not only cast immeasurable liability on the carriers but remove security from those

carried." (*Great Northern Ry. Co. vs. Wiles*, Adm. 240 U. S. 444)

Mr. Huxoll's act in stepping on a busy railroad track, obscured with steam and smoke, was not unlike that of a person placing his body within an elevator shaft. The case of *Knapp vs. Jones, et al.*, 50 Neb. 490, was such a case. The court held that plaintiff could not recover. It says at page 494:

> "The defendant (in error) knew that the elevator was being operated. He had been riding in it that day and his direct purpose in looking into the shaft was to see the elevator during its trip upwards and whether the doctor was a passenger. He knew of the wire screens which usually formed a part of the enclosure of the elevator shaft and had seen them removed but a very short time before temporarily to be painted and had watched the progress of work. He knew the use for which the elevator shaft was prepared and intended, and he was making a use of it for which it was never intended and to which he possessed no right or privilege, and which was dangerous, against which it was usually guarded in all parts by the screens. In order to effect his purpose he went up to the second step of the stairs and then leaned over the partition three feet high. These, with other facts in evidence, disclosed conclusively such want of ordinary care as to preclude his recovery of damages. The plaintiff's want of ordinary care and prudence were the cause of the injury, hence he could not recover damages (Whitaker's Smith, Negligence, 226, *Pierce vs. Whitcomb*, 48 Vt. 127; *Mau vs. Morse*, 33 Pac. Rep. (Colo.) 283); and though both plaintiff and defendant might have been negli-

gent in the premises, the plaintiff could not recover if, by the exercise of ordinary care, he could have avoided the injury (*Omaha Horse R. Co. vs. Doolittle*, 7 Neb. 481; Thompson, Negligence, 1104)."

The case of *Mau vs. Morse*, (Colo.) 33 Pac. 283, also grew out of an accident which happened in an elevator shaft. It was charged in the petition that the defendant was negligent in that it had failed to give proper warning and to properly construct the door leading into the elevator. It was admitted that the elevator descended without warning although its operator was supplied with a whistle "to warn everybody of the approach of the elevator." The court after stating that the plaintiff had the right to use the elevator etc., says, page 285:

"But outside of the elevator, he had no right to use the shaft for any purpose. He had no right to be within or to have any part of his person within the shaft except as he was at the same time within the elevator. As long as he was using the building and its appliances for the purposes for which he was invited to use them, he was in no danger. It was only when he undertook to use them in a manner outside of any invitation and any right which he had that the disaster occurred * * * It is true that if the opening had been so protected the deceased would probably have been unable to thrust his head into the shaft, but we are not sure that he could not have found some other means of equally unnecessary danger; and as to him, with the knowledge of the situation which he possessed, or ought to have possessed, the failure of the defendants in that regard can hardly be said to be negligence * * * *

If a man in his sound senses, with his eyes open voluntarily and deliberately, even if carelessly, thrusts

himself into the jaws of death, we know of no theory upon which any one can be held responsible for the consequences of his act but himself."

The defendant in error introduced the following rule of the Railroad Company in support of her contention that the failure to ring the bell was actionable negligence.

"The engine bell must be rung on approaching every station, public road crossing, at grade, tunnels and snow sheds, and until they are passed; and the whistle must be sounded at all whistling posts." (Record, p. 276)

The following rule was introduced by the Railroad Company:

"Employes must not remain near the track when trains are passing, as coal, stone, car doors or other articles are liable to fall from the train. On double track, employes must stand outside and clear of both tracks while trains are passing. *All employes are further warned that they must not rely on others to notify them of the approach of a train.*" (Record, p. 591)

The trial court instructed the jury as follows:

"You are instructed that the rules of the defendant which have been introduced in evidence and which require the giving of certain signals on approaching stations and bridges, have no application to this case for the reason that the deceased was not near any station or bridge at the time he received the injuries that resulted in his death, and for the reason that such rules have no application whatever to switch engines and that such rules are withdrawn from your consideration and should not be considered by you in any way in your deliberations.

You are instructed that the rule of the defendant which has been introduced in evidence, and which required trains to stop where required by law has no application in this case for there is no law of this state or the United States that requires an engine to stop before approaching the place where Mr. Huxoll was at the time he received the injuries which resulted in his death." (Record, p. 49)

There was no evidence that there was any custom or rule requiring the Railroad Company to send a flagman ahead of the engine to keep people off of the track. Whatever precautions were taken along this line were for the purpose of preventing engines and trains from colliding with each other and not for the purpose of keeping pedestrians off of the track. Neither was there any evidence tending to show that such precautions would have prevented the accident, or that the failure to take them contributed to Mr. Huxoll's injury.

It is the theory of the defendant in error that Mr. Huxoll stepped on the track immediately in front of the moving engine and she denies that he walked between the rails of the track for some distance before he was struck. She further contends that the steam and smoke were so dense that Mr. Huxoll could not see the locomotive before it struck him. If Mr. Huxoll, as contended by the defendant in error, walked along the north side of the track in the gravel walk provided for him until he was within 15 feet of the water crane and then stepped on the track immediately in front of the engine, which he could not see for smoke and steam, a flagman preceding the engine on foot would not have discovered Mr. Huxoll because the flagman would necessarily have been some distance ahead of the engine and would have met and passed Mr. Huxoll long before

he went on the track, and even if he could have seen him through the smoke and steam, it is not likely that it would have occurred to him to stop and tell Mr. Huxoll to keep off of the track as he would have expected Mr. Huxoll to do this without warning. But a flagman walking ahead of the engine that struck Mr. Huxoll would not have discovered Mr. Huxoll and neither would Mr. Huxoll have discovered the flagman, because the flagman would have been, according to the theory of the defendant in error, between the rails while Mr. Huxoll was north of the track and some distance from its center. As the contention is that the smoke and steam were so dense that an object such as a locomotive could not be seen for any distance, it of course follows that had a flagman preceded the engine he and Mr. Huxoll would not have discovered each other.

If the engine had been stopped and a flagman sent ahead, this precaution could not have prevented Mr. Huxoll from stepping on the track immediately in front of the engine after it started. But as said by this court in Aerkfetz vs. Humphreys, 145 U. S. 418, "it cannot be under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected."

If there had been one or more men riding on a footboard on the engine they could not have seen Mr. Huxoll for the steam and smoke; but assuming they could have seen him before they reached him they would have assumed that he would stay on the walk instead of stepping on the track immediately in front of the engine, and could not have saved him.

BUT ONE REASONABLE INFERENCE CAN BE DRAWN FROM THE PROOF AND A QUESTION OF LAW ONLY IS PRESENTED.

One of the principles of law we wish to refer the court to before reviewing the evidence is the rule that where but one reasonable inference can be drawn from the undisputed facts a question of law only is presented and there is nothing for the jury to decide.

In *Mau vs. Morse* (Colo.) 33 Pac. 283, the court says page 284,

> "The question of negligence is a mixed one of law and fact. Where the facts are disputed or of doubtful character the question must be submitted to the jury under the instructions of the court, but where there is no controversy as to the facts and from these it clearly appears what course a person of ordinary prudence will pursue under the circumstances, the question of negligence is purely one of law. *Fernandez vs. Railroad Company*, 55 Calif. 45. * * * "

In *Kemp vs. Ry. Co.*, 91 Kans. 477, 138 Pac. 621, it is said:

> "Where different persons might reasonably draw different inferences and reach opposing conclusions from undisputed facts, the proper inference or conclusion is one of fact for the jury, but where only one reasonable inference can be drawn or deduction made, a question of law only is presented."

This principle is supported by all of the authorities, some of which are as follows:

Empire State Cattle Co. vs. Railway Co., 210 U. S. 1, 10.

Knapp vs. Jones, 50 Neb. 490.
Shiverick vs. Gunning, 58 Neb. 29.

Giving the defendant in error the benefit of every reasonable inference that can be drawn from the evidence in this case, still she is not entitled to recover.

A RAILROAD TRACK IN ACTIVE USE IS PER SE A WARNING OF DANGER.

Another general principle of law we wish the Court to keep in mind is clearly stated in the case of *Chicago, St. P. M. & O. Ry. Co. vs. Kroloff*, 217 Fed. 525; Judge Sanborn says in his opinion the following "are among propositions of well established law:

> '(a) That a railroad track in active use is per se a warning of danger, and that any one is thereby admonished that a train is liable to pass over it any time. (b) That no one, whether passenger, licensee, or trespasser, can approach a railroad track so near as to be hit by a passing train without first both looking and listening to ascertain whether a train is approaching which might injure him. And a fortiori (c) that no one, whether passenger, licensee, or trespasser, can frequent or walk over a private railroad yard covered by many tracks, employed constantly for a variety of purposes, like through travel, switching, breaking up and making up trains, without scrupulously observing the precaution just alluded to, and otherwise exercising the utmost degree of vigilance in looking out for approaching engines and trains. Great is his peril, and proportionately great should be his effort to protect himself therefrom.' "

In the syllabus the court says:

> "It is his duty to look and listen. If he cannot see or hear that no engines or cars are approaching, it is

his duty to stop until he can. *If smoke or steam obscure his vision, or noise his hearing, it is his duty to keep off the track until they so disappear that he can be sure that he will incur no danger by entering upon or crossing it.*"

It appears from the statement that the accident referred to in the petition occurred at a place where many of the employes of the defendant, and among them the injured party, who worked for the defendant on the west and lived on the east side of these tracks, had been accustomed to cross the track, and that he crossed it going to and from his work.

Therefore, the accident occurred at a place where the Railroad Company might expect to find persons on the track, and where the injured party had a right to be, whereas the accident which resulted in the death of Mr. Huxoll occurred at a place where no person ever went upon the track, and at a place where the Railroad Company had no reason to expect Mr. Huxoll or others to be.

It will probably be contended that contributory negligence was a complete defense in the Kroloff case while it goes to mitigation of damages in this case, but under the facts in that case it was immaterial whether the right to recover was denied upon the ground of contributory negligence, or whether it was placed upon the ground of assumption of risk, or upon the ground that the deceased's own reckless act was the proximate cause of his injury. As said in the case of *Seaboard Air Line Ry. vs. Horton*, 239 U. S. 595:

"The distinction, which was of little consequence when assumption of risk and contributory negligence led to the same result, becomes important in actions founded upon the Federal Employers' Liability Act, which in ordinary cases recognizes assumption of risk

as a complete bar to the action, while contributory negligence merely mitigates the damages, as was pointed out when the case was here before * * * The disputable point above referred to was not then presented for decision. Nor is it now presented, for upon the last trial the court, in the instruction given to the jury, put the plaintiff (upon the hypothesis of his persisting in the face of an imminent danger, where a man or ordinary prudence would not) in the position of assuming the risk—a position more favorable to defendant (plaintiff in error) than that of contributory negligence."

(See *Great Northern vs. Wiles* 240 U. S. 444)

It seems to us that the court was of the opinion that the plaintiff was not entitled to recover in the Kroloff case in any event, and as it was immaterial whether the right was denied him on the ground of contributory negligence or upon the ground that he assumed the risk, or upon the ground that his own reckless act was the proximate cause of his injury, it did not make any distinction between these defenses.

In *Elliott vs. Ry. Co.*, 150 U. S. 245, 248, this court says: "The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on the track or that there is no danger therefrom."

Mr. Huxoll was warned of danger by the track. He knew that an engine or train might come at any time and that if it did he could neither see it nor be seen by the men in charge of it in time to avoid injury to himself. He disregarded the warning he had and was killed. It certainly cannot be seriously contended that the failure to give Mr. Huxoll additional warning was the proximate cause of his injury when it is so plain that his own disregard of the warn-

ing and knowledge he in fact possessed was its proximate cause. He was already warned of danger when he saw the track. He disregarded it. No warning would have saved him unless he heeded it. A bell or a whistle could have added very little to the knowledge he possessed.

The facts in the case of *Aerkfetz vs. Humphreys*, 145 U. S. 418, are in some respects similar to the facts in the present case. The court says that the measure of duty to plaintiff, who was an employee,was not such as to a passenger or a stranger.

> "As an employe of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains. For a quarter of a mile east of him there was no obstruction, and by ordinary attention he could have observed the approaching cars. He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which cars were to be expected, and continues his work without ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employe, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard?

They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. *The person in direct charge had a right to act on the belief that the various employes in the yard familiar with continuously recurring movement of the cars, would take reasonable precaution against their approach.* The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars, and enabled him to step to one side as they moved along the track. *It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants, and if by any means negligence could be imputed to them, surely plaintiff by his negligent inattention contributed directly to the injury.*"

IT WAS NOT NEGLIGENCE TOWARD MR. HUXOLL TO OPERATE THE ENGINE IN THE MANNER PLAINTIFF CLAIMS DEFENDANT OPERATED IT.

Referring to the question as to whether or not the acts complained of were negligence as to Mr. Huxoll, we call the

Court's attention to the line of decisions holding that while an act may be negligence as to certain persons, it is not necessarily negligence as to others not similarly situated.

In *Norfolk & W. Ry. Co. vs. Gesswine* 144 Fed. 56 it is held that "The custom of a railroad Company to give signals as required by" a statute "was for the sole benefit of persons using or about to use the crossing so that a failure to comply with such custom did not constitute negligence of which the administrator of a trackman killed in collision with a passing train, while walking near a crossing, could complain."

On page 59 of the opinion the court says: "Such statutes are obviously for the benefit of those using or about to use the crossing, and do not impose any duty in respect to any other class of persons."

On page 60 it further says: "The principle is the same whether the 'custom' of ringing and whistling for road or street crossing be imposed by rule of the Company or by operation of the common law in respect to the care proper to be exerciesd at points where the railway and the public have equal rights, as at a public crossing. The duty would be one imposed for the benefit of those using or about to use the crossing. * * * *"

The case of *Marklinger vs. Union Pacific R. R. Co.*, 95 Kan. 69, 147 Pac. 1132, was an action brought to rerecover damages for the death of the plaintiff's husband. The deceased, Mr. Marklinger, was stationed by the section foreman at a highway crossing, his duty being to give signals to stop trains so that they would not run into a soft place where the section gang was at work. Marklinger was run over by a train and killed. It was his duty to stop the train by placing two torpedoes on the rail about thirty feet apart, half a mile from the danger point, and a third at a distance of one-quarter of a mile, the first ones

being the caution signal and the other the stop signal.

> "The flagman was expected to remain at the stop signal until relieved. Upon hearing the caution signal the engineer was expected to respond by two short blasts of the whistle and to look out for stop signals ahead. Marklinger placed two torpedoes about a quarter of a mile west of the crossing, and the third about 30 feet west of where he was killed. Each of them exploded * * * No Whistle was sounded until the stop signal was reached, when two short blasts were given.
>
> The acts relied upon as constituting actionable negligence on the part of the defendant are the failure to sound the whistle for the crossing, and as an answer at the time the caution signal was reached, and the failure to stop the train sooner. The failure to blow the whistle for the crossing was not the omission of a duty owing to the flagman. *St. Louis & S. F. Ry. Co. vs. Payne*, 29 Kan. 166; *Clark vs. Mo. Pac. Ry. Co.*, 35 Kan. 350, 11 Pac. 134; Note, 17 L. R. A. 254. The requirements that the engineer should sound the whistle in answer to the caution signal, and should stop the train promptly upon hearing the stop signal, were obviously intended for the protection of the passengers, and not of the flagman, and their violation could not be the foundation of an action on his part."

As we understand it, the defendant in error relies upon the allegation that there was a custom requiring the Railroad Company to ring the bell and to send a flagman ahead of the engine when proceeding through fog. Admitting for the sake of the argument that the evidence showed there was such a custom, there is absolutely no testimony tending

to show that this custom was inaugurated for the intention of protecting people upon the track.

The case of *Railroad Company vs. Payne*, 29. Kan. 166, is in point. It appears that Payne hitched his team at a mill which was close to the railroad track. The team frightened at a train, broke loose, ran upon the track and was injured. The statute required that the train should whistle 80 rods before reaching a crossing that was in close proximity to the place where the team was hitched. Payne testified that the whistle did not blow 80 rods from the crossing as required by the statute, but that if it did he would have heard it coming and given more attention to his team. The Court says:

> "The material question therefore in this case is, whether Payne is entitled to recover on account of the omission of the railway company to sound the whistle on its engine eighty rods from the place where its road crossed the highway. * * * Payne was in the mill and his team was hitched when the whistle ought in the first instance to have been sounded; he was not then traveling on the highway at or near the crossing, nor was his team at large near the crossing. His only purpose in wanting the whistle sounded was to give him notice of the approaching train so that he might leave the mill and hold or look after his team. As thus situated, the railroad company owed him no duty under the statute to sound the whistle. (1 Thompson on Neg., p. 452; *Harty vs. Rld. Co.*, 42 N. Y. 468; *Elwood vs. Rld. Co.*, 4 Hun. 808; *Rld Co. vs. Spearen*, 43 Pa. St. 300; *O'Donnell vs. Rld. Co.*, 6 R. I. 211; *Holmes vs. Rld. Co.*, 37 Ga. 593; *Rld. Co. vs. Houston*, 95 U. S. 697."

As has already been said, it was unnecessary for Mr. Huxoll to go upon the track to get from the wash house to

his engine and when he did so under the above decision he must be held to have assumed the risk of injury.

It is said in *Ry. Co. vs. Gravitt*, a Georgia case reported in 26 L. R. A. at page 553, ... Ga. ...., that

> "Relatively to a person who without license from the railroad company is walking upon a railway track on a trestle though such trestle be situated between a blow post and a public crossing, the omission of the engineer to comply with the statutory requirements as to giving signals and checking the speed of the train was not negligence, inasmuch as these requirements raise no duty as between the company and strangers who may be upon the track elsewhere than at a public crossing."

Many authorities are cited in the opinion of this case in support of this position.

In *Kansas City, Ft. S. & M. R. Co. vs. Kirksey*, 60 Fed. 999, it is said:

> "Ordinances requiring railroad companies to keep flagmen at street crossings are not intended for the protection of the company's employes; and therefore, in an action for negligently causing the death of a switchman riding on a switch engine, which was derailed by an obstruction at a crossing where no flagman was stationed, it is error to admit such an ordinance in evidence."

The opinion in this case was written by Judge Taft. At page 1004 of the opinion Judge Taft says:

> "There was no flagman at Jefferson Street when the accident occurred, and the ordinance was relied upon

as the basis for argument that, if the company had had a flagman there, he would have signalled the train to stop, and the accident would not have occurred; wherefore it was said that the failure of the Newport News Company to obey the ordinance was a violation of its duty causing the accident. Manifestly the ordinance was passed to save the public traveling along the streets from injury by passing trains, and was not enacted at all for the purpose of protecting the employes of companies engaged upon its trains. The presence or absence of the flagman at this crosssing had nothing to do, therefore, with the operation of the trains, except to keep the public out of the way of them. The absence of the flagman may have been a failure of duty by the railroad company to the traveling public, but it was not a failure of duty to any of its employes."

As stated before if the rules and custom of the Company required the defendant to ring the bell and to send a flagman ahead of the train, such rules and custom were for the protection of the trains themselves and were not intended for the purpose of protecting employes who went upon the track at a place where they had no occasion or right to be, and while the absence of a watchman or the failure to ring the bell may have been a failure of duty by the Railroad Company to the parties the rules or customs were intended to protect, it was not a failure of duty to Mr. Huxoll.

Assuming for the sake of the argument that there was sufficient evidence in support of the allegation that the bell was not rung to warrant the court in submitting this question to the jury and that its verdict conclusively settles the question against the plaintiff in error, still the defendant in error was not entitled to recover on this ground because there is no evidence to show that it was negligence as to

Mr. Huxoll to fail to ring the bell at the time and place in question. This is also our position in regard to the allegations that the brakes were out of order and that there was no lookout either on the engine or preceding it.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS MR. HUXOLL'S OWN UNNECESSARY AND RECKLESS ACT OF GOING UPON THE TRACK.

It is said in *Railway Company vs. Gelvin* 238 Fed. 14, that

> "Where the facts concerning defendant's negligence and the resultiug injuries were undisputed, the court may, the resulting injuries not being such as might have been anticipated, declare as a matter of law that the negligence was not the proximate cause.
>
> That the injury might possibly result from a wrong does not show that it was the proximate result of such wrong, and the wrongdoer is not liable.
>
> If the wrong and resulting damage are not known by common experience to be natural and usual in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the damage is not sufficiently shown to be the result of the wrong to support an action.

There is no evidence in this case to show that employees or others had any reason to or did in fact go upon the track at the place where Mr. Huxoll was run over. Since there was no reason for the defendant, or its employees, to expect persons to be upon the track at that place, injury to Mr. Huxoll, or others, was not the natural and usual result either of the failure to take the precautions which the plaintiff alleges were not taken or the want of proper brakes on

the engine, and neither of these alleged acts of negligence was the proximate cause of the injury to Mr. Huxoll. According to the ordinary course of events no one would have been injured by the engine, though operated in the manner plaintiff alleges it was operated, because the engine so operated could harm no one unless they went on the track in front of it. The defendant was not required to anticipate that Mr. Huxoll or others would wrongfully go upon the track, and was not required to anticipate that he or others would be injured by the operation of the engine along the track. On the other hand, Mr. Huxoll was bound, as a matter of law, to anticipate that a train or an engine might pass along the track at any time and that he might be run over if he went on the track. Under the principles announced in the above decision, which are not new but well settled, the evidence not only fails to show that the negligent acts complained of were the proximate cause of the accident but on the contrary it does show that Mr. Huxoll's reckless and wrongful act of going on the track was the proximate cause of his injury. His act resulted in the very thing that everybody knows by common experience was likely to happen. The natural and usual sequence of going on a busy railroad track, enveloped in a dense cloud of smoke and steam, is to be run over and killed but to run over some one at a place where they are not expected to be is not the natural and usual sequence of operating an engine in the manner plaintiff alleges the defendant operated the engine which ran over Mr. Huxoll. It follows that Mr. Huxoll's own reckless act was the proximate cause of his injury.

Neither the engineer nor the fireman saw Mr. Huxoll before the accident, and neither of them knew that he was on the track, consequently no attempt was made to stop the engine until after Mr. Huxoll had been run over. Under

such circumstances, it is plain that the condition of the brakes could not have had anything to do with the accident and was not the proximate cause thereof. In its opinion in this case the Supreme Court of Nebraska says:

> "*The accident would have happened if the brakes had been working, since they were not applied, nor attempted to be applied, until after Huxoll had been knocked down and run over.* (Record p. 652).

There was no evidence that there was a material amount of ice at the water-crane, or that Mr. Huxoll went onto the track to avoid ice, as alleged in the petition. It is, therefore, clear that the evidence fails to show that ice at the water-crane had anything to do with the accident, or that it was the proximate cause thereof. Referring to this charge of negligence the Supreme Court of Nebraska says:

> "The yardmaster testified that there was more or less ice all about the platform and track at the crane, and that about fifteen feet west of the crane he found marks in the snow in the middle of the track that indicated that Huxoll had been knocked down at that point." (The testimony referred to is set out herein at pages 34 to 37) "This is only about two steps from the west end of the platform. If the jury disbelieved *Dupont's later testimony, and there was ice frozen on and about the platform, Huxoll, if walking parallel with the main tracks, may have stepped between the tracks to avoid the ice, or he may have lost his way in the dense cloud of smoke and steam.*" (Record p. 654)

Since the evidence leaves the reason for Mr. Huxoll going onto the track in such doubt, it cannot be said that it proves that the proximate cause of the accident was the

negligent accumulation of ice at the water-crane. The court in its opinion admits that "he may have lost his way in the dense cloud of smoke and steam." If he did this, then, of course, the Railroad Company ought not to be charged with the responsibility of the accident, on the theory that Mr. Huxoll went onto the track because the railroad company failed to keep the way free from ice. (See authorities cited on Pages 67 to 72 of this brief.)

The Supreme Court of Nebraska says in its opinion in this case (Record p. 655):

> "The court is committed to the doctrine of *Glantz vs. The C. B. & Q. R. Co.*, 90 Nebr. 606, 611, that to run a high tank road engine backwards through railroad yards without a lookout, when to have one is the usual custom in such yards, is a negligent act. This is a humane doctrine, and we adhere to it. *It may be true as defendant asserts that the cloud was so dense that a lookout could not have warned Huxoll until too late, but the surrounding conditions were in evidence and the matter was for the jury.*"

The plaintiff based her suit upon the theory that the smoke and steam were so dense that Mr. Huxoll could not see the locomotive until he was run over. If the smoke was so dense that he could not see the locomotive, then it, of course follows that a lookout could not have seen and warned Mr. Huxoll until too late. It is plain, under such circumstances, that the accident would have occurred if a lookout had been stationed on the running board, and that the failure to have a watchman on the running board was not the proximate cause of the accident. This was not a question for the jury. (See authorities cited on pages 14 and 22 of this brief.)

As stated before, we contend that the evidence shows that the bell was ringing, but conceding for the purposes of the argument that it was not, the evidence shows that failure to ring the bell was not negligence towards Mr. Huxoll, and also that it was not the proximate cause of the accident. Mr. Huxoll was already warned of danger and the bell, had he heard it, would have added little to the knowledge he possessed. He knew as soon as he saw the track that trains and engines were to be expected every moment. As said by this court and many others, the track itself was a warning of danger. (*Elliott vs. Ry. Co.* 150 U. S. 245, 248; See also authorities cited on page ~~23 and~~ 24 of this brief.)

Since Mr Huxoll failed to heed the warning he already had, there is no assurance that he would have heard and heeded a bell. It was his duty to protect himself by heeding the warning of danger he in fact possessed. As said in the case of *Aerkfetz vs. Humphreys*, 145 U. S. 418:

> "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forward and backward, would have simply tended to confusion. * * * It cannot be that under these circumstances the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected."

In addition to this we call the court's attention to a rule of the company which provided that "* * * All employees are further warned that they must not rely on others to notify them of the approach of a train." (Record p. 591).

Great Northern vs. Wiles 240 U. S. 444

This rule of the railroad company is in harmony with the rule established by the courts.

In *Connelley vs. Pa. R. Co.* 201 Fed. 54, 57, the Court says:

> "Indeed, in thus making self-protection the substantial safeguard of trackwalkers and sectionmen, the law is reasonable and just, for no other dependable safeguard can be afforded their perilous work in the practical operation of railroads. As said in *Keefe vs. Railway Co.*, 92 Iowa, 182, 60 N. W. 503, 54 Am. St. Rep. 542, 'These rules are founded upon the necessities of the business of operating railways,' and in *Rosney vs. Erie R. Co.*, 135 Fed. 311:
>
> 'An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.'
>
> This rule has the uniform support of courts in all sections of the country. *Morris vs. Boston & M. R. R.*, 184 Mass. 368, 68 N. E. 680; *Bancroft vs. Boston & M. R. R.*, 67 N. H. 466, 30 Atl. 409; *Railroad Co. vs. Hester*, 64 Tex. 401; *Carlson vs. Cincinnati, S. & M. R. Co.*, 120 Mich. 481, 79 N. W. 688; *Pennsylvania R. R. Co. vs. Wachter*, 60 Md. 395."

The court then says that the duty of guarding himself against trains rested on the deceased, and that a study of the testimony

> "leads to the sad conclusion that the death of this unfortunate man was due to his own momentary disregard of the peril of his situation. To aid these trackwalkers in taking care of themselves, the railroad required them to go in pairs, and, indeed, Connelley's companion called his attention to the enveloping steam, and ad-

vised their moving aside. Obviously self-preservation, the steam enveloped position he was in, together with the knowledge that trains were constantly moving, should have led the decedent to heed the warning instead of making chance and not care the insurer of his safety. The failure of decedent to heed this timely warning and step aside undoubtedly cost him his life. The railroad had taken the additional step of placing a brakeman on the switching train. He was on watch and had the emergency brake ready, but the steam which enveloped Rowan and Connelley until they were struck made it just as impossible for the brakeman to see them as it was for them to see the approaching train."

It will be observed that in the Connelley case a brakeman was riding on the foot-board in the same position that the plaintiff claims a brakeman should have been riding on the engine that run over Huxoll, but the brakeman was unable to avoid the accident to Connelley, because, as the court states, the steam which enveloped him until he was struck made it just as impossible for the brakeman to see Connelley as it was for Connelley to see the approaching train.

The same is true of Mr. Huxoll. The same smoke that hid the locomotive from him also hid him from the engineer and fireman and had there been a watchman on the footboard he could no more have seen Mr. Huxoll than could the brakeman in the above case see Mr. Connelley.

THERE WAS NO EVIDENCE THAT THERE WAS A MATERIAL AMOUNT OF ICE AT THE WATER CRANE OR THAT MR. HUXOLL WENT ON THE TRACK TO AVOID THE ICE, AS ALLEGED.

The only evidence touching upon the allegation that the defendant negligently permitted ice to accumulate at the

water crane and that Mr. Huxoll departed from the broad gravel walk provided for his passage in going from the wash house to his engine in order to get around the ice, is as follows:

Mr. Matthews, fireman, stated on direct examination that there was ice all around the water crane, but he could not state in what quantities (Record, p. 178). On cross examination he stated that this ice came from overflow as engines were being used and that it was a usual condition in cold weather. (Record, p. 194). Mr. Borton, yardmaster, in testifying for the plaintiff, said that he was by the crane a number of times that day and that there was some ice there, "just little splashes down between the platform and the track, clear around the water crane." (Record, p. 100). Ice was not permitted to accumulate but was kept as clean as possible by the sectionmen (Record, p. 101). On cross examination he stated that the ice did not cover the platform but was simply in spots; that he had no difficulty in walking across or around the platform (Record, p. 122). Mr. John A. Nicholson, the roundhouse foreman, when called as a witness for the plaintiff, stated that he helped turn the crane to water Orton's engine and was on the platform at the time. (Record, p. 147). Mr. Cloyd M. Johnston, the section foreman in charge of the Sidney Yards, said that he passed the point of accident and water crane a couple of times that morning, once on his way to work and later in inspecting the track before the accident; that he found some snow against the rail by the crane, but no ice around the crane except possibly a little scum of ice on the platform which did not amount to anything. (Record, p. 285). He passed over the platform and had no difficulty in doing so. Later he states again that there was "very little ice on the platform but not to amount to anything" (Record, p. 287). These are all the witnesses who

mention the ice around the platform except in a very casual way and the quotations which we have given state the condition as strongly against the plaintiff in error as any witness stated it.

There is no evidence whatever tending to show that the water crane was out of order or that such ice as there was about the water crane was due to the negligence of the plaintiff in error, neither was there any testimony tending to show that Huxoll went upon the track to get around ice as charged in the petition.

Only two witnesses gave direct testimony as to Huxoll's actions shortly before the accident. Mr. Orton, an engineer who boarded one of the engines that was to go to Perdue, testified in behalf of the defendant in error that he was with Huxoll at Mrs. Burke's house when they were both called to leave at 11:10 A. M.; that he and Huxoll went to the wash house (Record, pp. 134-135). Mr. Dupont, who was Mr. Huxoll's fireman, stated that he left the wash house with Huxoll about 11 A. M., and that they went south to the main line and then turned east along the main line about opposite the turntable. He was walking on the north side of the track and Mr. Huxoll after reaching this point was walking in between the rails of the main line about 10 or 12 feet behind him. (Record, pp. 379-380). As they walked along, he, Dupont, heard a noise that sounded like an engine but could not tell whether it was coming from the east or west, it was a rumbling noise, and when he heard it he notified Huxoll and the next moment his grip which he was carrying in his right hand was knocked out of his hand and he at once turned around and saw the engine knock Huxoll down. (Record, p. 381). On cross examination he stated that he was about 25 or 30 feet west of the water crane when he was struck (Record, p. 384). On rebuttal the plaintiff offered in evidence

testimony from a former deposition of Mr. Dupont's to the effect that Mr. Huxoll was struck 10 or 12 feet west of the water crane. All of the witnesses agree that after the engine stopped Mr. Huxoll was about 70 feet west of the water crane, that the tender and part of the engine had passed over him and that his body was in the center of the track near the ashpan with the right arm under left main driver. A number of witnesses also testified that they found marks in the snow which indicated that Huxoll had been struck about 15 feet west of the water crane.

It was agreed between the parties that these road engines are 70 to 75 feet long.

It cannot be seriously contended that this evidence proves either that the Railroad Company negligently permitted a material amount of ice to accumulate at the water crane or that Mr. Huxoll stepped from the way provided for him because it was obstructed with ice.

The Supreme Court of Nebraska in discussing this phase of the case says:

> "If the jury disbelieved Dupont's later testmony, and there was ice frozen on and about the platform Huxoll, if walking parallel with the main track, may have stepped between the tracks to avoid the ice, or he may have lost his way in the dense cloud of smoke and steam." (Record p. 654).

This statement of the supreme court is an admission that the allegation that Mr. Huxoll went on the track to avoid ice at the water crane was not proven.

In *Pittsburgh, C. C. & St. L. Ry. Co. vs. Scherer*, 205 Fed. 356, it is said:

> "The rule is too firmly established, to need extended reference to authority, that where one of two

or more things may have induced the accident, for one of which the defendant is responsible and for the other of which he is not, it is not permissible to speculate between the several causes, and to find that the defendant's negligence was the real cause, in the absence of satisfactory foundation in the testimony for that conclusion. *Patton vs. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Smith vs. Illinois Central R. R. Co.* (C. C. A. 6th Circuit) 200 Fed. 553, 555, and cases cited."

If Dupont's testimony is disregarded, then the only evidence tending to show where Mr. Huxoll stepped from the gravel walk and went upon the track is that of the witnesses who testified that they found marks in the snow which indicated that Mr. Huxoll was struck about 15 feet west of the water crane.

If he was 15 feet west of the water crane when he stepped from the gravel walk onto the track, he had not yet reached the platform around the water crane. This platform was only 13½ feet long east and west. The water crane was in the center of the platform and of course, the west end of the platform extended only 6¾ feet west of the water crane.

The marks in the snow referred to in the evidence as indicating where Mr. Huxoll was struck were 15 feet west of the water crane. If he was struck at this point and stepped on the track at this point then he must have stepped immediately in front of the engine and must have been run over before he had taken a single step forward after stepping on the track. One of two things must be true. He either stepped on the track more than 15 feet west of the water crane or the engine was so close to him when he went on the track that it struck him before he had time to take a single step after going on the track.

The charge that the defendant negligently permitted ice to accumulate at the water crane and that Mr. Huxol went on the track to avoid it is not supported by any evidence and should be disregarded.

MR. HUXOLL ASSUMED THE RISK.

In *Jacobs vs. Southern Railway Company*, 241 U. S. 229, it is held that:

> "Under Par. 4 of the Employers' Liability Act assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employes; in other cases therefore it is retained.
>
> An experienced employe, admittedly knowing the material conditions and presence of a pile of cinders who attempts to board a moving engine with a vessel of water in his hand, must be considered as appreciating the danger and assuming the risk although at the time he may have forgotten the existence of the cinders; and this is so even if the employer was negligent in allowing the cinders to remain. There being no violation of any safety statute, the common-law defense of assumption of risk is not eliminated in such a case by the Employers' Liability Act."

In *Randall vs. B. & O. R. R. Co.*, 109 U. S. 478, the petition alleged as grounds of action that the defendant negligently constructed and kept its tracks and switches in dangerous condition; that an employe of the defendant negligently propelled one of its locomotive engines over and against the plaintiff; that this was done without sounding any whistle or ringing any bell, as required by the laws of the State of West Virginia. The statute required the whistle

to be sounded or the bell rung at a distance of at least 60 rods from the place where a railroad crosses a public highway. The evidence showed that the injury occurred at night at a place where there was a network of tracks in the defendant's railroad yard. On the night in question in the performance of his duty as a brakeman on a freight train, he unlocked a switch which enabled his train to pass from one track to another, and he was stooping down to unlock the ball of a second switch to let the engine of his train pass to a third track, when he was struck and injured by the tender of another freight engine which projected ten inches beyond the rail. The court held that there was not sufficient evidence of any negligence on the part of the railroad company to warrant a verdict for the plaintiff and that the testimony of the plaintiff and his witnesses was too slight. The Court says:

> "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecessary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track."

It is alleged in the petition that the defendant's round-house was located close to the track and "that the smoke and steam incident to its maintenance and operation enveloped and obscured its engines and cars passing over said main line track and obstructed the view of engine and train movements thereon and upon the side tracks and engine tracks in near proximity thereto and to the said water-crane, to the peril of its employes and servants working in and about the said yards." (Record p. 3).

The petition alleged that the round-house was negligently located, but the plaintiff made no effort to prove this allegation.

In *Connelley vs. Pennsylvania R. Co.*, 201 Fed. 54, it is said:

> "An employe assumes the obvious and unavoidable risks of the employment, and the employer violates no legal duty in failing to protect an employe from the dangers of such employment."

Mr. Huxoll had been in the employ of the company for a long time and knew that smoke and steam sometimes settled to the ground as it did on the morning of the accident. He must have seen it and knew of its presence and that it added to his peril when he went onto the track.

In the Connelley case it is further said:

> "It is an obvious fact that many occupations, as for example a powder mill operator, a structural iron worker, a diver, a blaster, a trackwalker, necessarily subject those who follow them to great dangers. When, therefore, a man contracts for such employment, he knows and takes on himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very na-

ture of things part of his employment. It follows, therefore, that the employer violates no legal duty to the employe in failing to protect him from dangers which cannot be escaped by any one doing such work. (*Narramore vs. Cleveland, C. C. & St. L. Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.)"

The defendant had no way of preventing the smoke and steam incident to its business from settling to the ground and enveloping Mr. Huxoll but he had it within his own power at all times to protect himself by keeping off of the track, and it was his duty to do so. Self protection on his part was the only way the accident could have been avoided.

Mr. Huxoll was aware of all of the conditions that confronted him. He knew the location of the tracks, and the use that was made of them. He knew that the steam and smoke made it impossible for any one to see him for any distance. If, as claimed by the plaintiff he saw ice at the water crane and stepped on the track to go around it he must have known and appreciated the dangers of so doing and he assumed the risks incident thereto, one of which was the risk of being run over, and for these reasons alone the railroad company is not liable and the court should have so instructed the jury.

REVIEW OF THE EVIDENCE.

Before reviewing the testimony introduced to prove that the engine had no brakes, or bell, and that the Railroad Company backed it over Mr. Huxoll without warning at a high and dangerous rate of speed, we will state that it is our position that even if these allegations were proven, which we deny, the evidence does not show that such acts or either of them were the proximate cause of the injury to Mr. Huxoll or that they were negligence as to him; that is,

it is our contention that the failure to ring the bell or sound the whistle, or to keep a lookout, or the failure to equip the engine with brakes, was not the omission of any duty owing to Mr. Huxoll and was not the proximate cause of his injury. That if the Railroad Company did fail to equip the engine with air brakes such failure in no way contributed to Mr. Huxoll's injuries; that if the rules and regulations required a lookout and that the enginemen should sound the whistle and ring the bell, these requirements were obviously intended for the protection of trains and passengers and the men in charge of the operation of trains on the main line and not for the protection of pedestrians walking on the track where they were not expected and had no right to be, and the violation of such requirements cannot be the foundation of an action for Mr. Huxoll's death.

We have already cited authorities in support of these contentions. (Ante Pages 28 to 34).

The Court will recall that it was claimed in the petition that Huxoll was ordered to proceed to his engine for the purpose of operating same eastward from the station of Sidney to a siding called Perdue for the purpose of moving from Perdue to Sidney a freight train carrying interstate commerce which had been stalled at Perdue, and that he received his fatal injuries while so proceeding to his engine. It was agreed by both parties at the trial that Fred Huxoll was called

> "by the defendant at Sidney, Nebraska, to take Engine 1909 to leave at 11:10 A. M. and proceed light in connection with another Engine 1913 and proceed east to Perdue side track to bring into Sidney a freight train * * * that the Engine which Huxoll was to take pursuant to said call was headed westward, that is to say it was to run backwards from Sidney to the freight

train above mentioned; and to go with said Huxoll as Conductor to bring in said train was B. R. Fletcher and the Engineer on the other Engine was Engineer Tom Orton." (Record, p. 609).

It was further stipulated at the trial that the freight train stalled at Perdue was carrying interstate commerce. (Record p. 94).

The engine which struck Huxoll was an ordinary road engine being used in yard service at the time, and when it struck Huxoll it was backing westward on the main line. This, of course, placed the engineer, Mr. Zimmer, on the south side of the engine and the fireman, Mr. Matthews, on the north side of the engine. Huxoll at the time was proceeding east from the wash house to the spot track where was located the engine which he was about to take to Perdue. There was no dispute at the trial as to the location of this engine and of the other engine which was to go out at the same time. Both of these engines were on the east spot track just north of the water crane, and both engines were headed west as indicated on the drawing Exhibit 4, which appears at page 608 of the record. Mr. Orton's engine, or engine 1913, was standing just opposite the crane taking water. Mr. Huxoll's engine, or engine 1909, was immediately east of this engine. There were no other engines on this spot track but there were three or four engines on the tracks north of the spot track or near the cinder pit. These other engines were also "steamed up." As Huxoll was on his way to his engine at the time he was run over, it is, of course, important to know where engines were ordinarily placed and where he would expect to find his engine. The record on this point is as follows:

Mr. Chas. B. Matthews, the principal witness for the plaintiff and the fireman on the engine which ran over Hux-

oll, testified on cross examination that it was customary to spot engines either east or west of the turntable, and that this was true regardless of which direction they were going (Record, pp. 197 and 198). Mr. John A. Nicholson, roundhouse foreman, at Sidney, who was called by both the plaintiff and the defendant testified, when called by the defendant, that the practice at the time of this accident was "to put all passenger engines on the west spot track and all eastbound freight engines on the east spot track, and west bound freight engines in either track." (Record, p. 427). That frequently in placing engines on the east spot track the first engine called would be placed furtherest east and in speaking particularly of Orton's and Huxoll's engines he said: "Both of these engines were called for the same time, a double header, and it would not make any difference where we set them, or what time we sent them out, the first engine that is supposed to leave Sidney, first, is set out first." (Record, p. 428). These are the only witnesses for either party that commented upon this particular feature of the case, except that Mr. Paul J. Dupont, Mr. Huxoll's fireman, who was with him at the time he was run over, stated, when asked where they were going, answered, "down to that engine on the spot track, where we always go to see whether it was there or not." (Record, p. 381).

This evidence shows that neither Mr. Huxoll nor Mr. Dupont, who was with him, would know which of the two engines that were standing on the spot track they were to take out, until they reached the engine and examined it.

THE EVIDENCE CONCERNING THE WAY OR WALK LEADING FROM THE WASH ROOM TO THE SPOT TRACK.

As to the route which was usually taken by engineers in going from the wash house to the engines located on the

spot track east of the turntable, the evidence was undisputed that the usual route was to go southeast between the turntable and the main track down to the engine, and it was not even contended that is was customary for engineers to go on the main line track. The evidence showed that there were no tracks between the main line and the roundhouse except those shown on Exhibit 4 (See page 00), and that the only track which it was necessary to cross in going from the wash house to an engine on the east spot track was the west spot track shown on Exhibit 4. There was also no dispute but that all of this intervening ground was covered with Sherman Hill gravel and that it was smooth the same as the depot platform. The turntable was 27 feet 7 inches from the main line. The only point where the gravel way became narrower was as you approached the water crane where the east spot track came down nearer to the main line, but even at the water crane the way was 12 feet wide.

Mr. Borton, yardmaster, in testifying for the plaintiff, stated that the logical route to take in going to an engine on this spot track from the wash house was around the east end of the turntable and that is the way the men generally went. (Record, pp. 123 & 124). Mr. Orton, the engineer who preceded Huxoll from the wash house to the spot track, stated that in going to his engine he went south of the turntable pit to his engine, which was being spotted at the water crane, and that it was not necessary for him to go on the main line track (Record, p. 136). Mr. Matthews, the fireman, who was the plaintiff's principal witness, also stated on cross examination that an engineer in going from the wash house to his engine on the spot track near the water crane would have an unobstructed path (Record, p. 190). Mr. Clark, the engine inspector who testified for the defendant, stated that the usual route for an engineer to take in going to his engine on the spot track was to cross the

west spot track and go east between the turntable and the main line (Record, p. 338); that the path taken on this route would vary in width from 60 feet to 12 feet (Record, p. 339). This witness also stated on cross examination by the plaintiff that he never saw an engineer go down the main line on his way to the spot track. (Record, P. 341). Mr. Asa T. Couch, another fireman, called by the defendant as a witness, stated that the usual route was for the engineer to go south of the turntable and north of the main line and that he had never seen an engineer go down the main line (Record, p. 354). Mr. Dupont, the engineer who accompanied Huxoll, said that he himself was taking the usual course to his engine at the time Huxoll was run down (Record, p. 388).

EVIDENCE CONCERNING THE WEATHER CONDITIONS AND SMOKE.

As to what the weather conditions were at the time of the accident and the extent that the smoke and steam obstructed the view of those on a train or those on the ground, the record is as follows:

Mr. Borton, the yardmaster, says that it was eighteen below zero with a strong northwest wind, snowing hard at times, and then there would at times be flurries and practically no snow. He also stated that opposite the roundhouse there was much smoke and steam from the roundhouse and engines near there and snow on the ground (Record, p. 100). With reference to the extent of the steam he said that for three or four hundred feet up and down the track by the roundhouse smoke and steam was so dense at times that you could not see at all (Record, p. 102). Mr. Orton, the engineer who preceded Huxoll to the spot track, stated that there was a pretty strong wind from the north, that it

was snowing, and that there was snow on the ground and steam and smoke drifting from the roundhouse; that at times you could see quite a distance and that at other times you could not see at all (Record, p. 135). He also stated as follows: "I think a man could tell where he was going up until the time he got down to my engine, and from there on I don't know." (Record, p. 136). Mr. Orton's testimony showed that he had not gone further east than his own engine. Mr. Matthews stated that it was cold and stormy, snowing, and that the steam and smoke was so dense at times you could not see (Record, p. 178); that riding in the engine he could not see the track ahead at all and at times could not see across the cab (Record, p. 184.) On cross examination he said that the smoke and steam extended thirty feet east of the crane, and as far west as the turntable; that you could not see through it at all, but occasionally the wind would shift and lift it up; that this condition of steam and smoke near the water crane was not an unusual one in cold weather (Record, p. 194). He also stated that after the accident when he got down on the ground he could see the rails plainly and distinctly (Record, p. 205). Mr. Cloyd M. Johnston, section foreman, stated that he went on duty about midnight before the accident because of the storm, and the morning of the storm was busily engaged cleaning out switches and going about the yard (Record, p. 283). He further stated, "The fog was pretty thick but I could tell where I was going—I could tell which track I was on, or whether I was between the tracks * * * I could see the rails, I could see the dark trail of the rails through the snow." (Record, p. 286). Mr. Zimmer, the engineer on the engine which ran over Huxoll, stated on cross examination that he could not see the rear end of the tank on his engine (Record, p. 313). Mr. Dupont, Mr. Huxoll's fireman, stated on cross examination

that it was cold and the wind was blowing (Record, p. 383), and it was snowing and that there was about an inch of snow on the ground (Record, p. 384); that he wasn't able to see the engine before it knocked the grip out of his hand because of the wind and storm (Record, p. 387); and that he could not see more than 12 or 15 feet ahead of him at any time (Record, p. 391).

THE EVIDENCE CONCERNING THE BRAKES AND THEIR FAILURE TO WORK.

We desire now to consider the testimony which bears directly on the question as to whether or not there was any testimony to justify submitting to the jury the charge that the condition of the brakes on the engine which ran over Huxoll contriubted to his death. Our contention is that there is not a syllable of testimony in this record which would justify a finding by the jury that the failure of the engine to stop sooner than it did after the engineer learned of Huxoll's presence on the track contributed in any way to the death of Huxoll. Before discussing the testimony which bears directly on this proposition, we desire to point out to the court that the charge that the brakes were out of order was sustained by very unreliable testimony and was contradicted by a mass of testimony that was not impeached in any way. The only witness who claimed that the brakes were out of order was the witness Matthews, who was the fireman on this engine. Matthews was discharged by the defendant four or five months after the accident (Record, p. 220), and admitted himself that he felt he was wrongfully discharged (Record, p. 221). Before this discharge he had given the defendant two statements as to this accident, which statements appear in full at pages 610 and 611 of the record and are marked respectively, Exhibits

7 and 8. One of these statements was taken by a claim adjuster, Mr. L. E. Johnston, whose testimony will be found at pages 397 to 411 of the record, and the other was taken on a printed form by Mr. Everett Foster, a clerk in the roundhouse foreman's office at Sidney, whose testimony relative to this statement will be found at pages 412 to 417 of the record. In neither of these statements did Mr. Matthews say anything about the brakes being out of order, and both of the witnesses who took the statements testified that he said nothing to them about the brakes being out of order. His claim at the trial was that the brakes were out of order because the air pipes were frozen (Record, p. 179). One place in his testimony he even claimed that the steam pipe that connected with the air pump was frozen. (Record, p. 226). This steam pipe which he claimed was frozen, according to his own testimony, ran inside the jacket around the boiler and about four or five inches from the boiler itself (Record, p. 229). The testimony of experts who testified for the defendant was to the effect that these pipes could not freeze although it was admitted that the braking appliances can get out of order by reason of cold weather by frost accumulating around the valves and in other ways. There were also a great many other ways in which it was shown that Mr. Matthews' testimony was not correct, but we will content ourselves on this branch of the case by briefly reviewing the overwhelming testimony to the effect that the brakes were in good condition at the tine of the accident.

The engine which ran over Huxoll was brought into Sidney on the morning before the accident by Engineer Frank Stewart, who had the engine all the way from Cheyenne to Sidney. Mr. Stewart testified that the engine was in good condition when he left it at Sidney that morning and that at that time there was nothing wrong with the brakes.

His work report which he turned in with his engine before any accident occurred was introduced in evidence and appears at page 611 of the record. This shows that Stewart asked for no repairs on any of the braking appliances. After Stewart had left the engine, the engine was turned over to the night yard crew and the fireman who had the engine for a short time before it was turned over to the day crew stated that the brakes were in good condition while the night crew had it. (Record, p. 352). Mr. Zimmer, the engineer who was operating the engine at the time of the accident stated that he and Matthews took the engine at six o'clock that morning; that when he took the engine he inspected it as engineers are required to account for engines in the condition that they receive them, and that at the time of this inspection the engine was in apparent good condition (Record, pp. 295 and 296). Mr. Zimmer also stated that after one or two moves of the engine he found that the brakes were not setting properly and discovered that some ice had formed on the brake pistons (Record, p. 297) from water which had dripped from a washout plug underneath the boiler (Record, p. 299). He stated he melted this ice off with burning waste and that as soon as the ice had been melted the brakes worked properly (Record, p. 297); that from that time on the brakes worked good (Record, p. 300). Mr. Zimmer stated that this ice that was frozen on the pistons was nowhere near the air and did not affect the air in any way, but simply prevented the pistons from going back and forth (Record, p. 299). No doubt it is this instance that Zimmer refers to which he states occurred about eight o'clock that morning which gave Matthews the idea of claiming that the brakes were out of order at the time of the accident. Engineer Zimmer further states that when the accident occurred and he learned of Huxoll's presence he applied the brakes and they took hold all right. In ad-

dition, Mr. Riggs, a switchman who was riding on the engine at the time, stated that he felt the brakes take hold. (Record, p. 438). Mr. Schroeder, an inspector, who assisted in taking Huxoll out from under the engine, testified that the brake rigging had to be disconnected in order to get Huxoll out (Record, p. 331), and that in order to disconnect this brake rigging it was necessary to release the air as the brakes were set, and that he himself told the engineer to release the brakes (Record, p. 332). Mr. Zimmer in his testimony also states that Schroeder told him to release the brakes so that they could disconnect the brake rigging (Record, p. 311). Mr. Jas. C. Clark, an engine inspector called by the defendant, states that he was present when the brake rigging was removed and he also inspected the engine that afternoon between one and two o'clock, and that nobody had worked on the engine in the meantime (Record, pp. 336 and 337); that this inspection took thirty or forty-five minutes and in connection with that inspection he testified that the air and brakes were in good condition (Record, pp. 338 and 339).

The foregoing analysis shows conclusively that Matthews' testimony that the brakes were frozen and out of commission was not true.

EVIDENCE BEARING ON THE QUESTION AS TO WHETHER THE CONDITION OF THE BRAKES HAD ANYTHING TO DO WITH THE ACCIDENT.

We now come to the question as to whether or not there was any testimony which would justify the jury in finding that if this engine had stopped quicker than it did after the engineer learned of Huxoll's presence on the track, Huxoll would not have been killed. In the first place it should be borne in mind that it was the plaintiff's theory that the enginemen could not see the track in front of them as they

backed down this main line. This theory was fully supported by the undisputed testimony as Matthews said he could not see the track ahead at all and at times could not see across the cab. (Record, p. 184). Engineer Zimmer also stated that he could not see the rear end of the tank. (Record, p. 313).

Now as to when the engineer first learned of Huxoll's presence. All of Matthews' testimony on this point is as follows:

"Q. When did you first discover that this engine had run over Mr. Huxoll?

A. When I heard somebody holler.

Q. Did you afterwards ascertain who hollered?

A. How is that?

Q. Did you afterwards learn who it was that hollered—well what did you do when you heard somebody holler?

A. I didn't do anything.

Q. Well, what did you say?

A. I do not remember of saying anything.

Q. Well did you get off of the engine after that?

A. I got off after we stopped.

Q. Now what did you discover when you stopped, and you got off—just tell the jury what you found there—and what you did then?

A. After we stopped I got off the engine and looked around and Mr. Huxoll was under the engine.

Q. Under what part of the engine?

A. He was under the driver and close to the ash pan, as near as I can remember.

Q. Was he alive or dead?

A. He was alive." (Record, p. 186).

In another place Matthews states as follows with reference to the distance engine ran after he first heard somebody holler:

"Q. What is your recollection of where your engine was, when you heard someone holler. With reference to the water crane?

A. We were west of the water crane, when I first heard him holler.

Q. How far?

A. I could not say.

Q. Do you know about how far this engine ran after you heard somebody holler?

A. Yes sir.

Q. About how far?

A. About 30 or 40 feet." (Record, p. 187).

On page 188 of the record we also find the following testimony of Matthews relative to the actions of Fireman Dupont who was walking ahead of Huxoll:

"Q. Did you hear anybody else holler there just at the time, or about the time you stopped?

A. Yes sir.

Q. Who?

A. Fireman Dupont.

Q. And where was he when you heard him speak?

A. I don't know where he was—he just had his head into the cab of the engine.

Q. And what did he say?

A. He told us to stop that we had run over someone.

Q. Did he say who it was that you had run over?

A. Yes sir.

Q. State What he said in that particular?

A. He said 'My engineer'."

All of the above testimony of Fireman Matthews was given on direct examination. On cross examination he testified as follows with reference to Engineer Zimmer's location at the time he, Matthews, first learned of Huxoll's peril:

"Q. Where was Engineer Zimmer at the time you first knew you had hit somebody?

A. He was on his side of the cab.

Q. Standing up or sitting down?

A. Standing up." (Record, p. 200).

On the engine with the engineer and fireman as they backed west on the main line was a switchman by the name of Riggs, who was standing on the steps on the south side of the engine in the gangway between the engine and tender. Mr. Riggs testified as follows regarding the time he first received notice that anything was wrong:

"Q. And as you came back past the point where the water crane is located, when did you first notice that there was anything wrong or that you had run onto something, or somebody,—about where was that?

A. Right in the fog, and steam, there, west of the water crane.

Q. And what first attracted your attention?

A. I felt a jolt on the steps of the tank or the tender. (Record, p. 435).

Q. Examine exhibit 10, and state if that is a picture of the engine 213, and tender?

A. Yes sir.

Q. Now will you indicate on this picture, the steps or place upon that engine, where you were at that time?

A. Down here on this lower step by the tender right here.

Q. What were you holding onto if anything?

A. This grab iron on the tank, and one on the cab.

Q. These two there? (Indicating.)

A. Yes sir.

* * * *

Q. Now you were standing on that step?

A. Yes sir.

Q. And what was it you observed while you were in that position, that called your attention to that fact, that something had gone wrong?

A. I felt a jolt on the walls of the tank next to the step.

Q. The front wheels of the tank, next to the engine?

A. Yes sir.

Q. Now when you felt that jolt, what did you do then?

A. I hollered for the engineer to stop, that we were on the ground, or on something.

Q. That is the engineer, Zimmer?

A. Yes sir.

Q. What did Mr. Zimmer do when you said that to him?

A. Well he started to stop here, and I got off, just before he stopped, and I ran to the rear end of the tank to see if I could see, and I could not see anything and I ran back to the rear end of the pilot to see if the wheels were on the ground." (Record, p. 436).

The above testimony was given on direct examination. On cross-examination Mr. Riggs testified as follows:

"Q. Did you see Huxoll on the track, before you hit him?

A. No sir.

Q. Before this engine hit him?

A. No sir.

Q. Did you look up the track to see if anyone was there?

A. I could not say.

Q. I asked you if you looked?

A. I was looking that way at all times.

Q. And you could not see the track, or any portion of it, at all times?

A. Not after we got in that smoke and steam.

Q. It did no good to look under those conditions from where you were standing,—you could not get any knowledge of any danger, to indicate it by any signals to the engineer?

A. Not when I could not see.

Q. So as you were operating him, the only way that you could tell of the presence of any obstruction on the track, was when you came against it?

A. It is true." (Record, p. 441.)

"Q. Then in giving the signal which you gave to Zimmer, you acted upon a warning received from the jolting of the engine, which had previously run over something, or else jumped the rails?

A. I yelled at him to stop.

Q. Well, I say, you relied upon the sensation of movement, or jolting of the engine?

A. Jolting of the tank.

Q. That was what gave you the information that there was something wrong, upon which you gave the signal?

A. Yes sir." (Record, p. 442).

Fireman Dupont, who was with Mr. Huxoll, testified as follows on cross examination:

"Q. Now you were meeting that engine?

A. Yes sir.

Q. And you couldn't see it until it struck you?

A. No sir.

Q. How did you explain the fact that you didn't see it, when you were facing it, and walking towards it"?

A. I wasn't looking for it.

Q. Was there any other reason?

A. There was a bad wind and storm there that I wasn't able to see." (Record, p. 387).

"Q. What was the first movement you made after the tender of the engine knocked your grip out from your hand?

A. I at once turned around to see if Fred had got out of the track.

Q. Well, after you turned around the tender had passed by so that you could not see Fred any more if he was between the rails.

A. I saw Fred yes sir,—I saw him get hit.

Q. Well you saw him before the engine got by you?

A. Yes sir.

Q. Well, what was the first thing that you did,—what was the first movement you made away from that point,—and what did you do?

A. After he was struck?

Q. Yes sir.

A. I got on the step of the engine.

Q. And did you mount the engine while it was in motion?

A. It was just about stopped when I got on the engine.

Q. Wasn't there steam still applied when you got on the engine?

A. No sir, I do not think so.

Q. Didn't you give Zimmer the signal to stop?

A. I hollered at him and told him to stop, yes sir, but before I did that, I think he was stopping already.

* * * * *

Q. Well after you got on the engine and told Zimmer to stop how far did the engine move then, before it came to a rest?

A. It just moved a short distance.

Q. Well, didn't it move an engine length?

A. No sir, I do not think it did." (Record, p. 388.)

The above questions were asked on cross examination and as a part of the same cross examination cousel for plaintiff read in evidence the following portion of a written statement given by Dupont:

"As the tank hit Huxoll I immediately jumped on the step at the cab of the engine, on the fireman's side, of engine 213, and hollered at the engineer, and told him to stop at once as he had run over my engineer. He did stop in about an engine's length or a little farther."

The record on this appears at page 393. Another portion of this statement as a part of his cross examination is found on page 394 and is as follows:

"The engineer did not shut off his engine until I notified him of the accident—Huxoll having been hit and knocked under the engine at this time."

The closing questions on cross examination are the following:

"Q. Did you say to Mr. Tramp that at the time you said that to Fred that you were struck and knocked down, and that when you gathered up your grip, Fred had been run over; or that in substance?

A. Yes sir.

Q. You think you said that to Mr. Tramp?

A. Yes sir." (Record, p. 396).

In connection with Mr. Dupont's testimony it is only fair to also call the court's attention to the following testimony given by Mr. Tramp, a witness called by the plaintiff on rebuttal:

"Q. Did Mr. Paul J. Dupont at your place of business in North Platte, on or about the fourth day of January, 1911, in speaking of the accident to Mr. Fred Huxoll state 'Fred look out I hear something, but at the same time I was struck and knocked down and when I gathered up my grip, Fred was run over,' or that in substance?

A. Yes sir." (Record, p. 456).

We have reserved Mr. Zimmer's testimony for the last so that the court could read that testimony in the light of the testimony of those who claim to have given him warning. Mr. Zimmer's testimony as to those on the engine with him was as follows:

"Q. Now who was on the engine as you came up the track west, into this steam where the accident happened?

A. Who was on the engine, you say?

Q. Yes sir.

A. Switchman Riggs and Matthews and myself.

Q. Where was Riggs on the engine?

A. He was standing on the steps in the gangway between the engine and the tender." (Record, p. 302).

His description of the accident itself is as follows:

"Q. Now, Mr. Zimmer, tell the jury about this accident to Mr. Huxoll, what you saw in approaching this place where he was injured; how you learned of the accident, and all about it. What you were doing, and tell them the whole story about it.

A. Well, we were down at the east end of the yards backing up the main line, and we got up a little west of the stock track alongside of the stock track there, and we came right up close through the dense steam and fog and snow, and I slowed down, and shut the engine off and the engine drifted along until it lightened up a little, until we could see a little further, and I gave the engine a little steam and I proceeded on up to where the accident happened at the rate of about three miles per hour I think. And the first I knew anything about it, Switchman Riggs said, 'Hold her' or 'Stop her' or something like that, and I applied the air brake and put on the emergency and reversed my engine and stopped, and that is all that was done until Mr. Huxoll was taken out.

Q. Did you get out of your engine cab, or did you stay at your post of duty in the cab?

A. I got down out of the cab and I started down and I met another engineer by the name of Thomas Orton and he said, 'get back up into the engine, we want you to move her; Mr. Huxoll is under the engine and we want to move her.' And then I got back up and then he said, 'Don't move her, we will have to disconnect the brakes to get her out.' (Record, pp. 310, 311). * * *

Q. When you got this signal or when Riggs said to you what you testified here that he said, giving you the first notice of anything being wrong—what was your position—where were you at that particular time?

A. I was standing up looking outside the window, looking west.

Q. That is the window that is shown on this photograph, on the side of the cab, is it?

A. (No answer).

Q. Is the window which is shown in Exhibit 10, where the line is running right down from the figure two?

A. Yes sir.

Q. What then did you have to do in order to stop the engine and apply the brakes?

A. I had to pull myself back into the window, and reach over and shut off the throttle and apply the brakes. I took hold of the reverse lever and put her in the forward motion." (Record, p. 311).

Q. Did you see Mr. Huxoll at any time before the accident in the track?

A. No sir.

Q. Did you know that he was in that track, or anywhere near the track when you came down there?

A. No sir." (Record, p. 312)

The above testimony was given on direct examination. On cross examination he gave the following testimony:

"Q Now at the time Riggs gave you this signal, you also noticed a grinding under the engine, didn't you?

A. Not at the time he gave the signal.

Q. Didn't you right at the very time that he gave you the signal, notice a grinding?

A. No sir.

Q. And didn't you think you had run through a switch and your engine was on the ground—was on the rails?

A. That wasn't at the time that Riggs gave me this signal. He gave me the signal before I felt the grinding.

Q. It was before you stopped?

A. Yes sir.

Q. Well, didn't you notice the grinding at the very time you got the signal?

A. No sir.

Q. I will ask you, if, upon the occasion previously referred to, in June, 1912, at the taking of your deposition, Mr. Hoagland didn't ask you the following question, 'Did you think when he gave you that signal' (referring to the signal received from Mr. Riggs), 'that you were to stop at the switch?' and did you not answer that question as follows: 'I heard the grating under the engine about the time he gave the signal. I thought we were on the ground. I thought the switch had been run through and we were on the ground.'

A. Yes sir, I thought we were on the ground, and it was when I felt the grating." (Record, p. 318)

He also testified that he did not see Dupont until after they had stopped. This testimony is as follows:

"Q. Did Mr Dupont climb onto the engine and give the signal to stop, or did you see him after the stop?

A. I saw him after the stop.

Q. He wasn't on the engine to give the signal for the stop, was he?

A. No sir.

Q. Didn't he holler for you to stop?

A. If he hollered for me to stop, the engine, I didn't hear him, when I saw him I was standing still.

Q. Did he tuck his head into the engine before or after you stopped?

A. Afterwards he stuck his head up under the curtain on the north side.

Q. That was after you stopped?

A. Yes sir." (Record, p. 325).

Before writing our brief in the Supreme Court of Nebraska, and again before writing this brief, we carefully read the testimony and can say without fear of contradiction that the above extracts include all of the testimony with reference to the point of time at which warning was given to the engineer of Huxoll's presence on the track. This testimony clearly shows that Engineer Zimmer did not know of Huxoll's presence until warned by Switchman Riggs and Riggs testified that the only way he knew anything was wrong was that he felt the jolt on the wheels of the tank which indicated to him that the engine was on the ground. No jury could find that this jolt was caused by anything but the wheels going over the body of Huxoll, so we say that the undisputed testimony shows that before Zimmer had an opportunity to get his hand on the brake, Huxoll had been run over, and that no jury should be permitted to say that his death was caused by anything which was done by the engineer after that time. It would be the wildest sort of speculation to say that the injuries received by Huxoll before Zimmer was warned would not have resulted in his death. The record is entirely silent as to what injury caused Huxoll's death as no witness testified upon that point. As a matter of fact, the only testimony in the record as to the nature of his injuries is the testimony of Engineer Thos. Orton, who accompanied Huxoll to Cheyenne. Orton states that he helped get Huxoll out from under the engine and when asked about his injuries, answered:

"A. Of course, we could not tell, only what was in sight, was the right arm, the left main driver was standing on it, at about the cuff of his glove, and he had a

bad scalp wound, and they afterwards found that the arm was torn out at the shoulder, but he was rolled up in his storm coat." (Record, p. 139).

There is nothing in this description to indicate what in fact caused Huxoll's death or when in point of time the particular injuries were received. The "bad scalp wound" referred to by the witness may just as well have been received at the instant that Huxoll was struck as at any later time, and this scalp wound may have been the cause of his death. So we say that in the condition of the record, no jury should have been permitted to say that anything that occurred after Huxoll was hit contributed to his death, and much less should they have been permitted to find that anything that occurred after Zimmer was warned contributed to his death for at that time Huxoll had not only been hit, but he had been run over by the tender of the engine.

THE EVIDENCE CONCERNING THE RINGING OF THE BELL.

The only witness whose testimony was positive that no bell was rung was Mr. Matthews, the fireman, who said that the bell was broken. In both of his previous statements given to the defendant, which are set out at pages 610 and 611 of the record, he stated that the bell was ringing. Mr. Zimmer, the engineer, and Mr. Riggs, the switchman on the engine, both claimed that the bell was ringing at the time of the accident. Mr. Cloyd M. Johnston, section foreman, heard the bell on this engine ringing as it passed him that morning prior to the accident and his testimony alone, we believe, would justify the jury in disregarding Matthew's testimony that the bell was broken (Record, p. 284). In addition, all the other employes who examined the engine saw nothing wrong with the bell and the engine inspector, Mr. Clark, who was working on Orton's engine when this

engine went by says that he heard the bell ringing. (Record, p. 336).

It was admitted at the trial that the defendant did not have a switchman on the leading end of the engine, but there was no evidence to show that this was negligence as to Mr. Huxoll, and besides the evidence shows that a switchman so located would have done no good because he could not have seen Mr. Huxoll in time to have avoided the accident.

The failure to send a flagman ahead of the engine was also admitted, but there is no evidence tending to show that this was negligence as to Mr. Huxoll.

EVIDENCE BEARING ON THE QUESTION AS TO WHETHER IT WAS CUSTOMARY FOR A SWITCHMAN TO RIDE ON THE FOOT-BOARD OF THE ENGINE FOR THE PROTECTION OF PEDESTRIANS AS CLAIMED BY PLAINTIFF.

Matthews is again the only man who gave any testimony regarding this charge of negligence. He testified on direct examination that it was the custom to have a switchman on the front end of an engine in the direction in which it was going (Record, pp. 176, 185). He also testified on page 188 on direct examination that it was the custom in going through smoke and steam to stop and send a flagman ahead. (The failure to do this is not mentioned in the petition.) On cross examination he testified on this point as follows:

> "Q. That is it. You speak Mr. Matthews of a custom or practice to have a switchman on the leading end of the engine, working in the yards. Now then I will ask you if it is not the fact that the switchmen ride on the switch engine while working in the yards,

at whichever end of the engine, will let them off nearest to the point where they are going to work again.

A. I have seen them do that, yes sir.

Q. Isn't that the custom?

A. No sir.

Q. It is not?

A. No sir.

Q. Isn't it the custom of switchmen and wasn't it at that time, in the Sidney yards, to—for the switchman, if the engine was backing up on the main line,—to go by a switch and head in on another track,—for the switchman to ride on the pilot end of the engine?

A. It might have been.

Q. And wasn't that the object of that order, that they might drop off the engine at the nearest point to the switch after the engine came to a stop?

A. I do not know.

Q. Assuming the engine to be running backward to head into a string of cars,—to hitch onto a string of cars, and then pull them forward, wasn't it a custom for the switchman to ride then on the rear end of the engine,—being in that instance the leading end of the engine?

A. Do you mean the front end of the engine?

Q. No, it confuses us all probably a little to talk about the front and back of the engine under these conditions, and circumstances. Your engine is here, facing the east, and it is backing up, the object of the movement being to hitch onto a string of cars and pull them somewhere. Now isn't it a custom for a switchman in such an instance to ride on the back of the tender?

A. It is, if you make it that way.

Q. Then is all your testimony in regard to custom or practice to be understood as to what the particular switchman made it or did?

A. Well, the custom might be one thing, and they would do another.

Q. Well, what is your notion of custom. When the custom was to ride here, but the switchmen usually ride somewhere else, it would not be a custom?

A. It would be a custom of his own.

Q. Was there any rule of the Union Pacific, governing the operation of the switchmen in the Sidney yards, at that time, requiring the switchmen to ride on the leading end of the engine?

A. I never seen one.

Q. Don't you know as a matter of fact there was?

A. I could not state because I never seen one." (Record, pp. 210-211).

In view of this cross examination we submit that Matthews' testimony, even if undisputed, would not be sufficient to justify a jury in finding that a custom existed such as claimed by the plaintiff. In addition to Matthews' testimony on this point, Mr. Cloyd M. Johnston, section foreman, testified that switchmen generally ride at the point that is nearest to their work (Record, p. 284); that he had never seen a switchman flag through a fog unless they were on some passenger train's time (Record, p. 290). Jas. C. Clark, the engine inspector, also said it was not the custom to have a flagman on the leading end of the engine (Record, p. 339). Mr. Asa T. Couch, night fireman, said there was no such custom (Record, p. 353). Jno. A. Nicholson, the engine foreman, also said that there was no such custom (Record, p. 431), as did Mr. Riggs, who also said that the men rode wherever it was the most convenient. Furthermore, it was alleged by the plaintiff and admitted

that the road engine which was being used had no foot boards on which a switchman could ride, and Zimmer, the engineer, said that they had used a road engine off and on for switching during the past five years (Record, p. 305). Other witnesses also stated that they occasionally used road engines in switching service.

It is also in evidence that there was a rule which provided that trains should be operated under control which meant that they should be so operated as to be able to stop within the distance which the track was seen to be clear. It was contended by the plaintiff that in view of this rule an engine could not be operated through smoke and steam without sending a man ahead to flag, and that the plaintiff's death resulted from a failure to so operate the engine under control. Defendant's witnesses testified that this rule did not apply to yard engines but was solely a train rule. For instance, Mr. Borton, the yardmaster, testified that yard engines were not required to move under control but that the rule relating to under control was more of a train rule (Record, p. 103). He said his instructions to the trainmen were simply to move carefully through the steam and smoke and that he had never instructed them to go through fog under control as that term was used in the book of rules (Record, p. 106).

THERE WAS NO EVIDENCE THAT THE FAILURE OF THE BRAKES TO WORK CONTRIBUTED TO THE ACCIDENT. (Ante pp. 58 to 71.)

Assuming for the purposes of this argument that there was sufficient evidence in support of the allegation that the brakes were out of order to warrant the courtin submitting this question to the jury, and that its verdict settles the question in favor of the defendant in error, still this charge

of negligence must be disregarded because there was no evidence that the failure of the brakes to work contributed in any way to the death of Mr. Huxoll.

This court, as well as all courts, has often held that verdicts cannot be based on surmise and speculation, but must be based on testimony logically pointing to that verdict. In the case of *St. Louis, Iron Mountain & Southern Ry. Co. vs. McWhirter*, 229 U. S. 265, it was held that to permit a judgment to be based on surmise or conjectures results in making the railroad company an insurer. That was an action brought under the Federal Employers' Liability Act and involved also the Hours of Service Act, and the court said at pages 281 and 282 of the opinion:

> "Assuming then that as the result of the hypothesis we have indulged in, the case is reducible to the Federal question last stated, we are clearly of the opinion that as there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident, reversible error was committed. Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

In the case of *Patton vs. Texas & Pac. Ry. Co.*, 179 U. S. 658, which was an appeal from a directed verdict in favor of defendant in an action by a fireman to recover for personal injuries, the Supreme Court affirmed the lower court and after discussing the evidence, Justice Brewer said (page 663):

> "Upon these facts we make these observations: First. That while in the case of a passenger the fact

of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely, *Stokes vs. Saltonstall*, 13 Pet. 181; *Railroad Company vs. Pollard*, 22 Wall. 341; *Gleeson vs. Virginia Midland Railroad*, 140 U. S. 435, 443, a different rule obtains as to an employe. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. *Texas & Pacific Railway vs. Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

This proposition is well stated in an opinion rendered by the Court of Appeals of the 8th Circuit in the case of *Midland Valley R. Co. vs. Fulgham*, 181 Fed. 91. In that case it was said at page 95:

"Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of

action in this case of the alleged defect in the lift pin lever and the coupler is indispensable to the maintenance of a verdict sustaining it. *Missouri, K. & T. Ry. Co. vs. Foreman*, 98 C. C. A. 281, 174 Fed. 377, 383; *Kern vs. Snider*, 76 C. C. A. 201, 203, 145 Fed. 327, 329; *Spencer vs. Railway Company*, 105 Wis. 311, 313, 81 N. W. 407; *Thomas vs. Railroad Co.*, 148 Pa., 180, 23 Atl. 989, 15 L. R. A. 416; *Hyer vs. Janesville* 101 Wis. 371, 376, 77 N. W. 729."

To permit the jury in this case to find that if the engine had been stopped any quicker than it was stopped after Zimmer received the warning, Huxoll would not have been killed, is simply to permit the jury to guess as to the extent of the injuries caused by the engine striking Huxoll and by the wheels coming in contact with his body at the time that Riggs was apprised of the fact that something was wrong. Even if we were wrong in our assumption that the first warning was given Zimmer by Riggs, our argument would apply with equal force for Dupont says again and again in his testimony that at the time he went to the engine and called Huxoll had been run over. Zimmer says he did not see Dupont or hear him until the engine stopped so it is apparent that any warning given by Dupont did not reach Zimmer, and that Dupont's actions are really immaterial in considering this phase of the case. His testimony, however, shows that even if the first warning was given by him and was heard and acted upon by Zimmer, still there is no testimony justifying the jury in finding that Fred Huxoll died as a result of anything that happened after that warning.

In this connection, we desire to call the court's attention to the fact that Zimmer's testimony to the effect that the first warning came from Riggs is supported by Mat-

thews' testimony, as Matthews says that Dupont did not call until about the time that the engine stopped. Furthermore, it will be noted that according to Matthews, Dupont said they had run over his engineer. We therefore submit that, viewing this testimony from any angle, the conclusion is irresistable that there was no testimony justifying the court in submitting to the jury the question as to whether or not Fred Huxoll's death was caused in whole, or in part by the condition of the brakes on the engine that ran over him.

The case of *Wilmington Mining Co. vs. Fulton*, 205 U. S. 60, was an action brought to recover for the death of an employe killed in a mine by gas. The petition under which the case was tried was divided into eight counts under the practice in the State of Illinois, and in two of those counts the negligence charged was that defendant had failed to construct cross-cuts and stoppings in the mine, and an alleged defect in connection with a ventilating fan. It was claimed by the defendant that these charges of negligence should have been withdrawn from the consideration of the jury and that the failure of the trial court to withdraw them from the jury was error. In discussing this proposition this court said: (Page 78).

> "We are constrained to the conclusion that prejudicial error was committed in these particulars. We think it is extremely doubtful whether there was any evidence in the record even tending to establish that in a long wall mine of the character of the one here in question cross-cuts and stoppings thereof were essential. But be this as it may, certain it is that there is no evidence whatever in the record tending to support the claim that the absence of cross-cuts and stoppings in the mine in question was in any wise the cause of the accu-

mulations of gas or the retention of the accumulated gas from the explosion of which Fulton was killed. We are also of opinion that there was nothing in the evidence which would have justified the inference that the absence of the wheel from the valve, forming part of the mechanism to operate the ventilating fan, was the proximate cause of the presence of the gas in the west roadway where Fulton was killed. The uncontradicted testimony showed that but a very brief interval, a minute or two, elapsed before a wrench was obtained, and the distance to the poiut where the gas had accumulated precludes the possibility of saying that the evidence tended to show that the absence of the wheel could have been the proximate cause of the accident. Under this condition of things, we find it impossible to say that prejudicial error did not result."

The plaintiff contended that these errors must be treated as not prejudicial in view of an Illinois Statute which reads as follows:

"When an entire verdict is given on several counts it will not be set aside or reversed because of any defective count, if one or more of the counts be sufficient to sustain the verdict." (Page 79).

In disposing of this contention, the court said at page 79:

"This statute of course lends no support to the contention here made that where a jury is wrongfully permitted over the objection of the opposing party to take into consideration in reaching a verdict counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based, that the judgment entered under

such circumstances can be sustained upon the theory that substantial rights of the objecting party had not been invaded."

In disposing of the defendant's contention that the charge of negligence under consideration should have been withdrawn from the jury, the Supreme Court of Nebraska said:

"It is contended that the court should not have submitted to the jury any issue as to the condition of the brakes on engine No. 213. There is a sharp conflict in the testimony with respect to the condition of these brakes. Zimmer, the engineer, testified that about 8 o'clock of that morning he noticed that the air was not working properly and he found upon investigation that the brake pistons were not working on account of ice that was frozen upon them, coming from a washout plug above them; that he then procured and set fire to some waste and oil and applied it to the brake cylinders until the brakes worked and he had no more trouble with them. The testimony of other engineers, having experience with air brakes, but who do not testify with respect to this particular engine, is that in very severe, cold weather, the air appliances sometimes freeze and require to be thawed out. Matthews the fireman, testified the air was not working, and the brakes could not be used at the time of the accident. The other men working with the engine testify that the brakes were in perfect working order at that time. If material, there was sufficient conflict in the evidence to take the matter to the jury.

We are unable to see wherein the condition of the brakes had anything to do with the accident, unless an inference may be drawn from the testimony that if

the brakes had been working properly, the engine, after knocking Huxoll down, would not have injured him fatally; that when the switchman on the engine called to the engineer, an immediate stop could have been made, and Huxoll would not have been entangled in the brake. If the eagine was only moving at the rate of three or four miles an hour, as these men say, the evidence shows that if the brakes had been set at once the engine would have made a quick stop and would not have dragged Huxoll for 60 or 70 feet. Riggs called to the engineer as soon as he felt the jolt occasioned by the trucks running over Huxoll. The accident would have happened if the brakes had been working since they were not applied or attempted to be applied until after Huxoll had been knocked down and run over. It seems a fair inference that Huxoll was fatally injured when run over by the trucks although he was conscious after being extricated, but the evidence is not entirely clear and we think there is sufficient doubt to render this a question for the jury. Defendant argues that if deceased was injured by a defective brake the defense of assumption of risk and contributory negligence are by the Federal statute eliminated and that it, therefore, was prejudicially erroneous to allow this issue to go to the jury. This is not quite accurate. The Federal Employers' Liability Act provides that the fact that the employe may have been guilty of contributory negligence shall not bar a recovery 'but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.' 4 U. S. Comp. St. 1913, sec. 8659, p. 3914. It is also provided that 'such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common

carrier of any statute enacted for the safety of employe, contributes to the injury or death of such employes 4 U. S. Comp. St. 1913, sec. 8660, p. 3914. The Safety Appliance Act made it unlawful for any such carrier to use 'any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system.' 4 U. S. Comp. St. 1913, sec. 8605, p. 3892. The defense of assumption of risk is not permitted when the Safety Appliance statute is violated, but contributory negligence is a defense pro tanto in all cases. We cannot give this matter the importance attached to it by defendant. Independent of the provisions of the Federal law, we take the view that though Huxoll assumed the ordinary risks of his employment, he did not assume such an extraordinary risk as that his employer would carelessly and negligently, while he was enveloped in a dense cloud of smoke and steam and was engaged in proceeding to his engine in the course of his duties, without warning or signal of any kind, run an engine through the fog and darkness upon him at such a rate of speed that it was impossible for him to know that it was coming until he was struck. *Under the undisputed facts the applicability of the safety appliance law is of no importance and contributory negligence is proper as a partial defense, regardless of whether a defect in the brake was proved.*" (Record, pp. 652-653).

It will be noted that the Supreme Court of Nebraska while unable to point out any testimony which would justify a finding that the failure to make a quicker stop would have saved Huxoll's life dismisses our contention as unimportant with the statement that under the undisputed facts the applicability of the Federal Safety Appliance Act was of no importance.

Since the violation of the safety appliance act, if it was violated, did not contribute to the injury or death of Mr. Huxoll, assumption of risk was open to the defendant as a complete defense and contributory negligence was open as a defense (Ante Pages 45, 46 and 47) in mitigation of damages.

Jacobs vs. Southern R. R. Co., 241 U. S. 229; *Chesapeake & Ohio vs. De Alley*, 241 U. S., 310; *Seaboard Air Line vs. Horton*, 233 U. S., 492.

Contributory negligence will be discussed in connection with other assignments of error. At this time, however, we call the court's attention to following statement in the opinion of the Supreme Court of Nebraska. "The amount of the verdict indicates the jury found no contributory negligence existed" (Record p. 656).

It seems to us that our contention that the record fails to show liability on the part of the railroad company is so "incontrovertible that reasonable minds might not differ about the conclusion that should be reached," and that the case should be reversed with instructions to enter judgment for the plaintiff in error.

II.

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

If we are wrong in our contention that the court should have instructed a verdict for the defendant, then it will be necessary to examine the errors, regarding instructions given and refused.

In *Railroad Company vs. Houston*, 95 U. S. 697, it is said:

"Again, there was no evidence of any attempt on the part of the deceased to cross the railway at the Harris Street crossing. She was not seen, as already stated, except when leaving her house, until immediately previous to her injury, and then she was ninety feet east of the crossing. Yet the court, at the request of the plaintiff, instructed the jury, as to the right of the deceased in passing the railway upon a public crossing, to rely upon a substantial compliance by the servants of the company with the duties required by law in giving signals and warnings of approach; and as to its liability if the deceased was killed by the cars while they were running to and over a public street crossing, without giving the required and usual signals of approach: and further instructed them, upon its own motion, that there was a controversy upon the evidence whether she crossed or attempted to cross the railway at the Harris Street crossing, or at a place not a crossing; and that this was a question of fact for their determination.

To instruct a jury upon assumed facts to which no evidence applied was error. Such instructions tended to mislead them, by withdrawing their attention from the proper points involved in the issue. Juries are sufficiently prone to indulge in conjectures, without having possible facts not in evidence suggested for their consideration. In no respect could the instructions mentioned have aided them in reaching a just conclusion."

The court instructed the jury (Instruction No. 13, Record p. 46, Error No. 13, Ante page 11) upon the question as to whether the defendant was negligent in failing to station a brakeman or other watchman on the leading end of the engine, and further instructed the jury that if it

found that the defendant was negligent in this particular, and that the death of Mr. Huxoll resulted in whole or in part from such negligence, the plaintiff would be entitled to recover.

In commenting on this instruction the Supreme Court of Nebraska says:

> "It may be true as defendant asserts that the cloud was so dense that a lookout could not have warned Mr. Huxoll until too late, but the surrounding conditions were in evidence, and the matter was for the jury." (Record p. 655.)

There was no dispute about the "*surrounding conditions.*" The plaintiff alleged and it was proven and admitted at the trial that the smoke and steam were so dense that it was impossible for Mr. Huxoll to see the locomotive until it was upon him. This is the very theory of the plaintiff's case. Since it was impossible for Mr. Huxoll to see the locomotive, it was also impossible for the same reason for any one stationed any where on the engine to see Mr. Huxoll, and the accident would have happened if a watchman had been riding on the foot-board.

In *Connelly vs. Pennsylvania R. Co.*, 201 Fed. 54 (Antepage 86) it appears there was a brakeman on watch, but as the court said:

> "The steam which enveloped Rowan and Connelly until they were struck made it just as impossible for the brakeman to see them as it was for them to see the approaching train."

In this case the smoke which made it impossible for Mr. Huxoll to see the approaching engine made it just as impossible for any one on the engine to see him.

In addition to this, there was no evidence tending to show that the defendant owed Mr. Huxoll any duty to station a watchman on the foot-board of the engine, or that it was negligence towards him to fail to do so. The evidence touching this phase of the case has been reviewed and it is unnecessary to go over it again here. (See pages 28 and 72 to 75 of this brief.)

In discussing the question as to whether there was a rule or custom requiring switchmen to ride on the leading end of the switch engine, the Supreme Court of Nebraska says:

> "There is a conflict of evidence upon this and the evidence to establish such custom is not strong." (Record p. 655).

The court concedes that if there was no evidence tending to prove that there was a custom requiring switchmen to ride on the leading end of the engine, the instruction under consideration would have been erroneous, but it takes the position that there was sufficient evidence to warrant the court in submitting this issue to the jury.

We submit that there is absolutely no evidence to show, either that there was any rule or custom requiring the defendant to keep a lookout on the engine to warn pedestrians, or that the absence of a lookout in any way contributed to the accident.

No verdict based upon the charge that the defendant was negligent because there was no switchman or lookout riding on the leading end of the engine should be permitted to stand.

The court also instructed the jury (Instruction No. 12, Record p. 45. Error No. 11, Page 9) that if it found that the brakes on the engine were not in working order and could not be used by the engineer, and further found that

the insufficiency of the brakes contributed to Mr. Huxoll's death "then the law is that the deceased, Fred J. Huxoll, cannot be held either to have been guilty of contributory negligence or to have assumed the risks of his employment."

The jury was also instructed (Instruction No. 16, Record p. 47. Error No. 12, Ante Page 10), that Mr. Huxoll did not assume the risk of his employment, if it found that the brakes were out of order and that that fact contributed to his death.

These instructions are erroneous because there was no evidence upon which to base them and because they do not state the law applicable to this case correctly. No verdict based upon the theory that the accident was due to defective brakes can be sustained.

In its opinion the Supreme Court of Nebraska says:

> "* * * Riggs called to the engineer as soon as he felt the jolt occasioned by the trucks running over Huxoll. The accident would have happened if the brakes had been working since they were not applied or attempted to be applied until after Huxoll had been knocked down and run over. * * *" (Record p. 652).

We have heretofore reviewed the evidence bearing on this question and it is not necessary to go over it again. (See pages 58 and 75 of this brief.) We have also cited authorities in support of our contention that there was no evidence upon which the jury could base a finding that Mr. Huxoll was not fatally injured before the engineer attempted to apply the brakes. (See pages 58 to 70 of this brief.)

As we understand the opinion of the Supreme Court, it holds that it was for the jury to say whether the alleged failure of the brakes to take hold contributed to Mr. Huxoll's death; but that conceding that there was no evidence upon which to base the instructions under consideration,

the instructions did not mislead the jury, and the error, if any, was not material.

The court takes the position that the instruction did not take away the defense of contributory negligence. It says: "Under the undisputed facts the applicability of the safety appliance law is of no importance and *contributory negligence is proper as a partial defense regardless of whether a defect in the brake was proved.* (Record p. 653).

We think that the court is mistaken when it says that contributory negligence is proper as a partial defense under the Federal Employers' Liability Law, where the violation of the safety appliance act contributed to the injury or death; but it is immaterial whether the interpretation placed upon the act by the Nebraska Supreme Court is correct or not; because the jury had the instruction and not the act of Congress for its guidance, and the instruction expressly tells the jury that if the insufficiency of the brakes contributed to Mr. Huxoll's death "*then the law is that the deceased, Fred J. Huxoll, cannot be held either to have been guilty of contributory negligence or to have assumed the risks of his employment.*"

The Court says in its opinion:

> "The amount of the verdict indicates that the jury found no contributory negligence existed." (Record p. 656)

It is true the amount of the verdict indicates that the jury did not diminish the damages for contributory negligence, but the amount of the verdict does not indicate whether the jury's failure to diminish the damages was due to a finding on its part that "no contributory negligence existed" as stated by the court, or to the fact that it followed the instruction under consideration. Inasmuch as the evidence shows conclusively that Mr. Huxoll was guilty of

contributory negligence, the failure of the jury to diminish the damages "in proportion to the amount of negligence attributable to" him cannot be explained by saying that the jury found that he was not guilty of contributory negligence.

The only reasonable explanation for the failure of the jury to diminish the damages is that it was misled by the instruction under consideration and reached the conclusion that "the law is that the deceased, Fred J. Huxoll, cannot be held either to have been guilty of contributory negligence or to have assumed the risk of his employment," as stated in the instruction.

In regard to that part of the instruction which denies the defense of assumption of risk, the court says:

> "The defense of assumption of risk is not permitted when the safety appliance statute is violated, *but contributory negligence is a defense pro tanto in all cases. We cannot give this matter the importance attached to it by the defendant.* Independent of the provisions of the Federal law, we take the view that though Huxoll assumed the ordinary risks of his employment, he did not assume such extraordinary risks as that his employer would carelessly and negligently, while he was enveloped in a dense cloud of smoke and steam and was engaged in proceeding to his engine in the course of his duties, without warning or signal of any kind, run an engine through the fog and darkness upon him at such a rate of speed that it was impossible for him to know that it was coming until he was struck." (Record p. 653).

We understand from this that the court holds, as a matter of law, that the defense of assumption of risk was properly withdrawn from the jury, whether the defendant violated the safety appliance law by failing to equip the engine with proper brakes, and whether such violation of

the law contributed to the accident or not. It will be noted however, that the court reaches this conclusion by assuming that the jury found that the defendant "carelessly and negligently, while he was enveloped in a dense cloud of smoke and steam and was engaged in proceeding to his engine in the course of his duties, without warning or signal of any kind, run an engine through the fog and darkness upon him at such a rate of speed that it was impossible for him to know that it was coming until he was struck."

As we have seen however, there was no evidence that the engine was operated at a negligent rate of speed. The Supreme Court admits this in another part of its opinion, where it says:

> "If the engine was only moving at the rate of three of four miles an hour as these men say, the evidence shows that if the brakes had been set at once the engine would have made a quick stop and would not have dragged Huxoll sixty or seventy feet." (Record p. 652)

In one portion of the opinion the court says that the jury may have believed that the engine was only moving at the rate of three or four miles an hour; while in the portion of the opinion under consideration it expresses the opinion that the jury found that the engine was negligently running at "such a rate of speed that it was impossible" for Mr. Huxoll to know that it was coming until he was struck. Even if there were a dispute in the evidence as to the rate of speed, no one could tell what the jury believed about the speed of the engine, and the court's assumption that the engine was operated at a dangerous rate of speed, is absolutely without foundation in the evidence. Again the Supreme Court assumes that the defendant "carelessly

and negligently, while he was enveloped in a dense cloud of smoke and steam * * * without warning or signal of any kind" run the engine through the fog and darkness upon Mr. Huxoll.

In determining whether or not there was evidence which justified submitting to the jury the defense of assumption of risk, it should not be assumed that the engine which ran over Huxoll was proceeding "without warning or signal of any kind." The evidence that the bell was in fact ringing and was in fact in good condition is so much stronger than Matthews' unsupported testimony to the contrary, that it was at least a debatable question whether the court should not have instructed as a matter of law that the charge that no warning was given was not supported by the evidnece. But however that may be, no one can argue that a jury on this record would not have been justified in finding and did not find as a fact that the bell was rung.

The testimony shows that the smoke and steam was plainly to be seen by anybody, and that it obstructed the view; that in cold weather it was not unusual for the steam and smoke to settle on the track around and about the water-crane, and that in cold weather steam and smoke were to be expected at that place. (Record p. 194).

As we have already stated, Mr. Huxoll clearly assumed all of the risks and dangers that were incident to his employment, and the above instruction was erroneous and prejudicial.

The Court also submitted the question as to whether Mr. Huxoll was guilty of contributory negligence to the jury. (Ante p. 13, Record p. 43).

The court should have held as a matter of law that Mr. Huxoll was guilty of negligence. Reasonable minds could not differ on this under the undisputed evidence.

Ry. Co. vs. Kroloff, 217 Fed. 525.
Railroad Company vs. Houston, 95 U. S. 697.

In the latter case it is said:

> "The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street-crossing does not relieve a traveler on the street from the necessity of taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses—to listen and to look—in order to avoid any possible accident from an approaching train. If he omits to use them and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses in such a position to take risks, he must suffer the consequences. They cannot be visited upon the railroad company."

Should the court take the view that Mr. Huxoll's own reckless act of stepping on the track was not the proximate cause of his injury, it certainly cannot take the position that he was not as a matter of law, guilty of contributory negligence. Yet the trial court instructed the jury not to consider contributory negligence if it believed the brakes were out of order and that this contributed to his injuries. Instead of so instructing the jury the court should have at least instructed it that Mr. Huxoll was guilty of contributory negligence and that the verdict should be diminished accordingly. There was, as has already been shown, no evidence that the condition of the brakes had anything whatever to do with the accident. The Supreme Court of Nebraska states that it is of the opinion that the jury did

not reduce the verdict on account of contributory negligence. (Record p. 656). (See authorities cited on page 84 of this brief.)

The court by the above instructions also took away the defense of assumption of risk, which should have been, to say the least, submitted to the jury.

Assumption of risk is a complete defense to a number of the charges of negligence, and the jury should nave been so instructed. (See authorities cited on page 45.)

If the case was one for the jury, the defendant was entitled to have it sumbitted under proper instructions instead of under the instructions that were given.

III.

THE COURT ERRED IN REFUSING TO GIVE CERTAIN INSTRUCTIONS.

The Railroad Company requested the court to instruct the jury that there was no evidence tending to show that it was customary to have a switchman on the forward end of an engine for the purpose of keeping a lookout, and warning the engineer and those upon the track of the presence of danger, and that the jury could not find a verdict on the ground that such custom did exist but was not being followed by the defendant at the time of the injury. The request was refused. (See Error No. 6, Ante p. 7, Record p. 30).

All of the evidence bearing on this issue has been reviewed. (See pages 72 to 75.) Since there was no evidence tending to prove such a custom the court should have so instructed the jury.

The court also refused to instruct the jury at the request of the defendant that it could not base a verdict

against the defendant on the ground that it failed to have a lookout on the foot-board of the engine for the reason that there was no evidence tending to show that Mr. Huxoll's death was caused in whole or in part by the failure to have a lookout so stationed. (Error No. 7, ante p. 7, Record p. 39). See pages 72 to 75 of this brief.

The court also refused the defendant's request to instruct the jury that the habits and customs of employes, such as brakemen, switchmen, or others, of riding on the foot-board of the engine, if any such habit or custom existed, would not be binding upon the defendant company so long as such habits were not required by the defendant company for the purpose of warning employes or others from the track, but were followed for the convenience of the employes. (Error No. 8, ante p. 8, Record p. 32). (See pages 28 to 34 of this brief.)

The court also refused the defendant's request to instruct the jury that there was no evidence tending to show that Mr. Huxoll's death was caused in whole or in part by the failure of the defendant to comply with any act of Congress enacted for the safety of employes. (Error No. 9, ante p. 8, Record p. 32). See pages 34 to 40 and 58 to 71 of this brief.

The court also refused the defendant's request to instruct the jury that it could not base a verdict on the ground that the brakes on the engine were out of repair for the reason that there was no evidence tending to show that Mr. Huxoll's death was caused in whole or in part by the failure of the engine to stop sooner than it did after the engineer was given the signal to stop. (Error No. 10, ante p. 8, Record p. 31). See pages 34 to 40 and 55 to 71.

The court also refused the defendant's request to instruct the jury that it could not find against the defendant on the ground that the engine was being negligently

operated at a high and dangerous rate of speed at the time that it struck the deceased, for the reason that there was no evidence tending to show that Mr. Huxoll's death was caused in whole or in part by the operation of the engine at a high and dangerous rate of speed, even though the jury found that said engine was in fact being so operated. (Error No. 14, Ante p. 12, Record p. 30). See pages 58 to 71 and 75 to 85 of this brief.

The court also refused the defendant's request to instruct the jury that it could not base a verdict against the defendant on the ground that the defendant gave no warning of the approach of the switch engine on the track, or on the ground that it failed to take proper precautions to ascertain whether the track was clear at the point where the accident occurred, for the reason that Mr. Huxoll had no duties to perform on or about the track at that point and the employes in charge of the engine had no reason to anticipate that Mr. Huxoll or any other employe would be on the track at that point. (Error No. 15, Ante p. 12. Record p. 31). See pages 28 to 34 and 39 to 41 of this brief.

What we have said in support of our contention that the court erred in refusing to instruct a verdict for the defendant applies to each of the above Errors, and it is not necessary to repeat what we have already said. We submit, however, that if the plaintiff failed to prove either or all of the above alleged acts of negligence covered by these instructions, then the jury should have been instructed accordingly, as requested; that is, we contend that it was error to submit to the jury any issue which was not supported by the evidence and the court should have taken each of the issues covered by the above instructions from the jury, and it was reversible error for it to refuse to give either or all of the instructions requested.

The court erred in its instructions and in submitting questions to the jury that were not supported by any evidence whatever, such as the question concerning the brakes and the question as to whether the defendant was negligent in failing to station a lookout on the engine. It also erred in submitting the question as to whether Mr. Huxoll was negligent to the jury, when the undisputed evidence showed conclusively that he was.

We believe the trial court erred in refusing to grant the railroad company's request for an instructed verdict and that the Supreme Court of Nebraska erred in affirming the judgment of the trial court, thereby holding and deciding that the railroad company was not entitled to an instructed verdict. If this court sustains this contention the case should be reversed and remanded with instructions to enter judgment for the railroad company. If the court does not sustain this position, then we believe that the case should be reversed and remanded with instructions to grant the defendant a new trial, because the Supreme Court of Nebraska erred in affirming the judgment of the trial court, thereby holding and deciding that the trial court did not err in its instructions to the jury, did not err in refusing to give the instructions requested by the defendant and that it did not err in overruling defendant's motion for a new trial.

Ry. Co. vs. De Atley, 241 U. S. 310, 318.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 104.

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

ELLA HUXOLL, ADMINISTRATRIX OF THE ESTATE OP FRED J. HUXOLL, DECEASED,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NEBRASKA

Reply Brief of Plaintiff in Error

N. H. LOOMIS,
C. A. MAGAW,
Attorneys for Plaintiff in Error.

(25,141)

STATEMENT

For the convenience of the court, we recapitulate the facts.

Plaintiff's decedent Fred Huxoll, locomotive engineer in the service of the defendant*, while

*We refer to the parties in the relations they occupied towards each other in the trial court.

walking between the rails of the main track through a cloud of steam and smoke, was run over and killed by a locomotive being operated in the yards of the railroad company at its terminal in the city of Sidney, Nebraska.

Decedent and a fellow engineer named Thomas Orton, had been ordered on the morning of January 1, 1911, to take two locomotives, which were standing in the yards at Sidney, and go east with them for the purpose of hauling to Sidney a freight train which had become stalled at a station named Perdue. It was a cold morning, snow was upon the ground, flurries of snow were in the air and a keen wind was blowing from the north. It was necessary for Mr. Huxoll, and his fireman, Paul J. Dupont, as well as for Mr. Orton and his fireman, to proceed from the washhouse, where their clothes were changed, in a southeasterly direction to a point just north of the main track, and thence eastward for a short distance, in order to reach the two locomotives which were standing upon a side track, called the "east spot track." This track was upon the north side of the main track and led from the round-house in a southeasterly direction to a connection with the main track.

Huxoll and his fireman, Dupont, who started for their locomotive at the same time, after reaching the main track walked in an easterly direction on the north side of the main track and encountered a heavy cloud of steam and smoke blowing across the track from the round-house.

In places it was impossible to see a locomotive through this steam and smoke, more than a few feet; and conversely it was impossible for the trainman to see for a greater distance.

While in this cloud of steam and smoke Mr. Huxoll left Dupont's side, who continued walking on the north side of the main track, and stepped between the rails of the main track. How far he walked while on this track is somewhat uncertain, but while there he was run into by a locomotive and killed. The engineer and trainmen on the locomotive which ran into him did not know he was on the track and had been run into, until after the tender had passed over his body, and until after a switchman standing upon the steps between the engine and the tender felt the jolt of the locomotive as it passed over him. The switchman (Riggs) who thought the locomotive must be off the track immediately called to the engineer to stop, and the locomotive was brought to a standstill. The engineer was looking out of the cab window at the time, in the direction in which the locomotive was moving, and immediately upon hearing the switchman call out to stop made use of all the appliances at hand to stop the locomotive, and it was promptly brought to a standstill. There is a conflict in the evidence as to the distance the locomotive ran after the engineer learned that something unusual had happened. Plaintiff also claims that the power brake upon the locomotive was frozen up and not in operation at the time of the accident. When the locomotive stopped, Huxoll was

found under the rear drive wheel in an unconscious condition and died the next day.

I.

ISSUES SUBMITTED TO JURY.

A great many specifications of negligence were set forth in the petition, but at the time of the trial the issues were reduced in number until as stated in the plaintiff's brief (pp. 14 and 15), the following points were left for consideration:

> "1. Whether defendant, in the conditions shown, was guilty of negligence in failing to station a man on the leading end of the engine, and whether the death of Fred Huxoll resulted, *in whole or in part, from such negligence*?
>
> "2. Whether defendant, in the conditions shown, was negligent in failing to keep its engine so under control as to be able to stop within the distance the track was seen to be clear, or in operating blindly next to the spot track, or in failing to take extra precautions at points where the track was obscured by smoke and steam, and whether the death of Fred Huxoll resulted, *in whole or in part*, from such negligence?
>
> "3. Whether the power driving-wheel brake of engine No. 213 was at the time of the casualty in working order, and, if not so in working order, whether such fact *contributed* to the death of Fred Huxoll? The effect of a finding for plaintiff on this issue was to elim-

inate the issues of 'contributory negligence' and 'assumed risk.' "

These issues may be grouped together and considered as involving acts of negligence arising from a duty owing from the railroad company to Mr. Huxoll (1) while he was upon, or about to go upon, the main track; and (2) after it was known by the trainmen that he was under the locomotive.

(*1*) *The duty owing to Mr. Huxoll while he was upon, or about to go upon, the main track.*

Plaintiff claims that the locomotive was run too fast; that the bell was not rung; that a watchman was not placed upon the leading end of the locomotive; that a switchman was not sent ahead of the locomotive while it was passing through the steam and smoke; all of which things should have been done for the purpose of warning Huxoll of the approach of the locomotive, and to enable him to get out of its way.

Necessarily if these things should have been done, it was because the defendant owed a duty to Mr. Huxoll to have them done, and because the failure to perform this duty was an act of negligence, which in whole or in part caused Huxoll's death. Throughout plaintiff's argument there is a failure to distinguish between a duty which might be owing to persons properly upon the track, and to those who had no right to be there. The fact that it may have been the de-

fendant's duty to blow a whistle or to ring a bell to warn persons who might be on a highway crossing ahead of the locomotive, or to warn section men who were repairing the track, or employes who were otherwise necessarily engaged in the performance of duties upon the track, does not mean that it was the duty of the defendant to give these signals in the anticipation that persons having no duties to perform upon the track, and not rightfully there, might possibly be upon the track, and in a place of danger. Plaintiff can only claim as negligence the failure to perform duties which were owing to Mr. Huxoll and not those which might be due to other persons. This point was raised not only by defendant's request for a peremptory instruction and by exceptions to various instructions given and refused, but was specifically raised by Instruction No. 21, requested by defendant. (Record p. 31, Error No. 28).

Plaintiff goes so far as to claim that a man should have walked ahead of the locomotive, or that the locomotive should not have been operated at all, through the thick cloud of steam and smoke. (Plaintiff's brief, p. 34.) In other words, that the defendant should have anticipated the presence upon the track of a man who was not rightfully there, and in order to protect him should have sent a man ahead, or even stopped the operation of trains through this particular zone while the view was obstructed by the steam and smoke. The defendant's contention is that it did not owe these duties to Mr. Huxoll, and had a right to

proceed upon the assumption that he would stay where he belonged, and not unnecessarily put himself into a dangerous position.

There is a difference in the testimony as to whether, at the time he was killed, Mr. Huxoll had been walking down the main track for a considerable distance, or whether he stepped upon it just as the locomotive reached him. It seems to us that a fair conclusion, after reading all of the testimony, is that he had been walking down the track towards the approaching locomotive for two or three hundred feet before he was struck. The plaintiff however seems eager to establish the fact that he stepped upon the main track right in front of the locomotve which hit him; but it does not make much difference, as it appears to us, as to which of these theories may be correct. In either event it is clear that Mr. Huxoll consciously and intentionally put himself in a place of great danger where he had no right to be, and that the results which followed cannot be attributed to any failure upon the part of the railroad company to perform a duty which it owed to Mr. Huxoll.

In the petition, in the testimony, and in the brief filed in this court, plaintiff lays stress upon the fact that in going upon the main track decedent was trying to escape a greater peril which would await him if he walked upon the platform about the water pipe; and that because of the imminent danger incident to stepping upon the platform where there were a few patches of ice, he was

justified in seeking safety by making a detour to the space between the rails of the main track.

That there may be no mistake or misunderstanding with respect to defendant's position on this proposition we quote from the petition, and from the brief of opposing counsel:

> "The defendant had negligently permitted an accumulation of ice about and in the vicinity of said water crane, and had negligently permitted the said water crane to become so out of repair that it permitted the escape of water on the ground, where it froze and rendered the way slippery and dangerous, making it necessary for deceased's own safety to make a slight detour in his course, and to cross on to the defendant's main line track." (Petition p. 3 of record.)
>
> "Being then between the main line and the spot tracks, he faced the platform beside which stood the tender of Orton's engine then taking water, and around which was the perilous ice, while the water was dripping from the crane and freezing as it fell. To the north of him was Orton's engine. To avoid Orton's engine, and the perils of the icy ground and platform around the stand pipe, he would naturally turn to the south, circling around the ice, a course which took him across the main line track, which appeared to be clear, and which had been assigned to him for the run upon which he was to start at once. In the circumstances he took apparently the

safest course open to him, and the issues of assumed risk and contributory negligence cannot be resolved against him as matters of law." (Brief of defendant in error, pp. 62 and 63.)

"There was Huxoll; the obstruction of the stand pipe and its platform, surrounded by the perilous ice, immediately in front, and Orton's engine on the left. He followed the instinct of self-preservation, and turned for safety across the main line which both he and Dupont thought was clear." (Brief of defendant in error, p. 66.)

The case must therefore be considered and decided upon the theory that Mr. Huxoll was fully aware of what he was doing when he stepped between the rails of the main track and that the act was a conscious and voluntary one.

It must be borne in mind that Mr. Huxoll was not a stranger to the premises, but that he was an engineer in the service of the defendant, familiar with the surroundings, and with the duties he was called upon to perform. He knew the dangers incident to train operations, and was fully cognizant of the perils which await the person who steps upon the main track of a busy railroad in one of its most important terminals. The perils are thus characterized on page 85 of plaintiff's brief:

"The Sidney Yard is on the Union Pacific main line. The volume of the traffic on the

main line of this double-tracked, trans-continental highway of interstate commerce, is so great as to make every division yard a place of incessant and ceaseless activity. The conditions of exceptional peril were affirmed by both parties."

When he stepped upon the main track he knew that a locomotive or a train of cars, was liable to be in operation upon it. It was his duty to anticipate that such might be the fact. On the other hand the men in charge of the locomotive were not justified in assuming that Mr. Huxoll would be upon the track. He had a safe place in which to walk in order to reach his locomotive, and there was no necessity for him to go between the rails of the main track. Having no duty to perform there, not being required to walk there in the performance of any duty, the train men were not required to anticipate his presence there, or to give those signals which would be required for the protection of employes or others who might rightfully be upon the track.

That plaintiff appreciates the importance of establishing the proposition that Mr. Huxoll was rightfully upon the track is shown by the emphasis placed upon the alleged danger of going upon the ground and platform surrounding the water crane, and the necessity of avoiding that danger by going upon the main track; also by the strenuous efforts made to establish the fact that Huxoll did not go upon the track some distance west of the water crane as testified to by Mr. Dupont (record,

p. 380), but that he did so at a point much closer to the water crane and right in front of the approaching locomotive.

As a matter of fact plaintiff concedes our contention, namely: that in order to establish defendant's failure to perform its duty towards Huxoll it is necessary to show that he was rightfully upon the track; and in order to prove that fact plaintiff undertakes to demonstrate that the standpipe and platform "surrounded by the perilous ice" constituted a serious danger and that to avoid it Mr. Huxoll "followed the instinct of self-preservation and turned for safety across the main line * * * ." (Plaintiff's brief, p. 66.)

We thus find plaintiff in the position of trying to establish the proposition that the danger incident to walking across the ground or the platfrom surrounding the water crane was so great that he was justified, in order to avoid it, in going upon the main track in a thick cloud of steam and smoke through which he would be unable to see an approaching locomotive for more than two or three feet. That the danger of going upon the main track was under the circumstances an extremely dangerous act must be conceded by any fair minded person.

Plaintiff asserts that Huxoll thought the track was clear (p. 66 of brief) or that it "appeared to be clear" (p. 63 of brief) but there is no justification for such an assertion. The tracks were located in the midst of a busy terminal of a great railroad

system; they were in constant use; and it was Mr. Huxoll's duty to assume that a locomotive or train would be in operation upon the track. The fact that Huxoll's locomotive had the right of way as far east as Perdue did not mean that its use was blocked to every other service prior to the time Huxoll's locomotive was ready to start. Furthermore the track where Huxoll was struck was west of the point where it would be used by Huxoll's locomotive in going from the spot track to Perdue (see Exhibit No. 2, p. 506 of record; also Exhibit No. 4, p. 608 of record); and the time had not arrived for the use of the main track by Huxoll's locomotive, when the accident occurred. (Record pp. 609, 230, 380.)

Let us then briefly consider the great danger which it is asserted would have confronted Mr. Huxoll if he had attempted to walk across the platform surrounding the water crane. The platform was thirteen feet six inches long, seven feet wide and six inches high. In the middle of it was the water crane, an upright metal pipe twelve inches in diameter. There were some few splashes of ice on the platform—not enough to amount to anything. The testimony on the subject is given in substance on pages 41 and 42 of our main brief. Testimony with respect to it is also quoted on page 46 of plaintiff's brief and we call the attention of the court to it. There was nothing in the condition of the platform which would make it difficult for a man to walk over it. It is impossible to keep walks in the winter time in such shape that there will be absolutely no ice upon

them. This cannot be done even in large cities where the walks are used by thousands of people daily. It is one of the usual incidents of life to which all persons adapt themselves just as they do to ordinary conditions brought about by rain and snow. There is no claim that the water pipe was defective or that there was an accumulation of ice due to negligence. The situation was a normal one and the difficulty incident to meeting it was negligible.

Mr. Borton, yardmaster, a witness put upon the stand by plaintiff, testified on cross examination (record, p. 122), that there were a few small spots of ice on the platform where the water had splashed; that he had been around the crane several times that morning and that he had no difficulty in walking across the platform. Mr. John A. Nicholson, roundhouse foreman, who was also placed upon the stand by the plaintiff testified that he helped turn the crane at the time engineer Orton's locomotive was watered and was upon the platform while it was being done (record, pp. 146 and 147.) Mr. Cloyd M. Johnston, section foreman, passed over the platform a couple of times that morning and had no difficulty in doing so (record, pp. 285 and 286.)

In order, apparently, to accentuate the great danger with which Huxoll was confronted, Counsel call attention not only to the ice in front of him but to Orton's locomotive at the north side of the platform. Orton's engine however was standing still and of course could not move out

until Huxoll's locomotive standing just east of it was out of the way. Instead of being an element of danger, Orton's locomotive would have been of assistance to Huxoll if he had needed it, to enable him to walk across the platform without falling down. It would have been an easy matter to have steadied himself with his hand against Orton's locomotive as he crossed the platform.

It must be apparent to any fair minded person that it would not have been dangerous for Huxoll to have walked across the platform; that the "perilous ice" to which counsel refers is a figment of the imagination, and that the conscious and voluntary act of decedent in going upon the main track was a grossly negligent act, for which he was solely responsible.

On the bottom of page 85 of plaintiff's brief a graphic description of the perils incident to the Sidney yards is given, and the concession made that employes should look out for approaching passing engines and trains. Then on page 86 the following occurs: "But how may they keep a lookout? The obvious answer is: Only by the use of the senses of sight and hearing. The duty of employing those senses for their own protection implies opportunities of seeing and hearing the approaching train."

Counsel overlook, as Huxoll apparently did the very obvious notice of danger in the track itself. In a yard as busy as the one at Sidney, where trains are constantly moving backward

and forward, the tracks themselves constitute danger signals and no man should go upon them without *knowing* in advance that he will not be hit by a passing locomotive or train. If the view is so obscured that he cannot see, then he should by all means keep off the tracks and not venture upon them.

We have so far proceeded upon the assumption that the bell was not rung, but we submit that a reading of the record, or of the testimony quoted in our main brief would convince any unbiased mind that the bell was rung.

If we are correct in the position we have assumed, that decedent was not justified in walking upon the main track and was wrongfully there, and that the railroad company did not owe to him the duty which was owing to a person rightfully upon the track, then the judgment in this case is based upon alleged acts of negligence having no actual existence, and must necessarily be set aside.

(2) *The duty owing to Mr. Huxoll after it was known by the trainmen that he was under the locomotive.*

Plaintiff argues that Mr. Huxoll would not have been killed if the power driving wheel brake of the locomotive had been in working order at the time of the accident. It is undisputed that the locomotive hit Mr. Huxoll while he was upon the track, and knocked him down, and that the

tender and the rear drive wheel of the engine ran over him; that the men upon the locomotive did not know of the accident until Mr. Riggs, a switchman, who was standing upon the steps between the tender and the locomotive felt the jolt of the engine as it passed over Mr. Huxoll's body. It thus appears that Mr. Huxoll, while walking upon the track towards the locomotive, was hit by a moving solid mass of metal weighing many tons; that he was thrown upon the frozen ground and run over by the wheels of the tender and the rear drive wheel of the locomotive. To argue that this was not a sufficient cause of his death and that he would have lived if the locomotive had been stopped more quickly after Riggs realized that something had happened, transcends all powers of reasoning. The burden of proof is upon the plaintiff to establish all the material facts necessary to create a cause of action. If in order to establish plaintiff's claim it was necessary to have it appear that decedent's death was brought about in whole or in part by the alleged failure to stop the locomotive more quickly, it was necessary for the plaintiff to establish that fact by competent evidence. It was not done. The claims which plaintiff makes with respect to this matter are all conjecture, pure and simple; there was no testimony whatever to establish the fact. Although the Supreme Court of Nebraska seemed willing to go to great lengths to affirm the judgment in this case, it was not willing to agree that Huxoll's death was to any extent attributable to the alleged failure to stop the locomotive more

quickly. Upon this subject the court made the following remarks (italics are ours):

> "We are unable to see wherein the condition of the brakes had anything to do with the accident, unless an inference may be drawn from the testimony that if the brakes had been working properly, the engine, after knocking Huxoll down, would not have injured him fatally; that when the switchman on the engine called to the engineer, an immediate stop could have been made, and Huxoll would not have been entangled in the brake. If the engine was only moving at the rate of three or four miles an hour, as these men say, the evidence shows that if the brakes had been set at once the engine would have made a quick stop and would not have dragged Huxoll for 60 or 70 feet. Riggs called to the engineer as soon as he felt the jolt occasioned by the trucks running over Huxoll. *The accident would have happened if the brakes had been working since they were not applied or attempted to be applied until after Huxoll had been knocked down and run over. It seems a fair inference that Huxoll was fatally injured when run over by the trucks although he was conscious after being extricated,* but the evidence is not entirely clear and we think there is sufficient doubt to render this a question for the jury." (Record, p. 652.)

If the alleged failure of the power brake to act had nothing to do with Huxoll's death, the trial court should not have submitted that issue

to the jury. See the following cases not cited in our main brief:

St. Louis & San Francisco Railroad Company vs. Conarty, Administratrix, 238 U. S. 243.
Louisville & Nashville Railroad Company et al, vs. O. Y. Layton, Vol. 37, Supreme Court Reporter, 456.

As the matter stands the jury was permitted to find wthout competent evidence to support it, and in the face of distinct and convincing testimony to the contrary, that the alleged failure to stop more quickly, due to the condition of the power brake, contributed to Huxoll's death. This was substantial error, which affected not only the main issue in the case but which deprived defendant of the benefit of decedent's contributory negligence and of the ordinary risks of the employment which he assumed.

Although we have argued the foregoing proposition on the theory that the power brake was not in working order we submit that the record shows, without opportunity for serious contention, that the power brake was in perfect order at the time of the accident and was used by the engineer as quickly as possible, in bringing the engine to a stop.

II.

ERROR IN INSTRUCTIONS

Before closing we wish briefly to emphasize a couple of points made in our main brief with respect to erroneous instructions.

(1) Instructions under which contributory negligence and assumption of risk were eliminated.

The court instructed the jury that if it found that the brakes on the engine were not in working order and could not be used by the engineer, and further found that the insufficiency of the brakes contributed to Mr. Huxoll's death "then the law is that the deceased Fred J. Huxoll cannot be held either to have been guilty of contributory negligence or to have assumed the risks of his employment." (See Instruction No. 12, record p. 45; Error No. 11, p. 9; also Instruction No. 16, record p. 47; Error No. 12.)

Under these Instructions the jury were permitted to ignore decedent's contributory negligence and his assumption of the ordinary risks of employment, provided they found that the brakes on the locomotive were not in working order, and that the insufficiency of the brakes contributed to Mr. Huxoll's death. We have shown, *supra*, that the alleged failure of the brakes to work had nothing to do with Mr. Huxoll's death, and that such an issue should not have been submitted to the jury. This being true it necessarily follows that the court committed palpable error in allowing the jury to ignore decedent's contributory negligence, and the assumption by him of the ordinary risks of his employment. It seems unnecessary to urge that Mr. Huxoll's negligence was very great and that if the jury had been permitted to consider it that the result would have been a large deduction from the amount of verdict.

As the record stands, no consideration was given to this proposition. Plaintiff was permitted to recover an amount based upon the assumption that the entire responsibility for decedent's death rested upon the defendant, and that the conduct of Huxoll did not contribute to the accident in any degree whatsoever. That there has been a great miscarriage of justice in permitting a large verdict against the defendant without a consideration of the very great contributory negligence of the decedent goes without saying, and we submit the point to the court without further argument in the confident belief that the error thus committed will be found sufficient to demand the setting aside of the judgment in this case.

(2) *Instruction under which an entirely irrelevant fact could be considered by the jury as negligence.*

The trial court committed a plain error in instructing the jury that the failure to station a man upon the leading end of the locomotive was negligence which would justify a recovery. (Instruction No. 13, record p. 46; Error No. 13.) Even though it should be held that Huxoll, under ordinary circumstances, was entitled to this protection, the failure to provide it at this particular time had nothing to do with the accident, because it appears from the undisputed evidence that Huxoll could not see the locomotive approaching him; and that being true it follows that a man upon the leading end of the locomotive could not have seen Huxoll. If he could not have seen

Huxoll, even though he had been stationed upon the leading end of the locomotive, it necessarily follows that a failure to have him there had nothing to do with the accident; and the trial court should not have permitted the jury to predicate negligence upon that fact. It was palpable error to do so, and sufficient we submit, to cause a reversal of the judgment.

III.

CONCLUSION

The foregoing is not intended as a substitute for the main brief, or as a waiver of any of the points or arguments set forth therein.

We respectfully submit that the judgment should be reversed and the cause remanded with instructions to enter judgment in favor of plaintiff in error.

N. H. Loomis,
C. A. Magaw,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1917.

No. 194.

Sup. No. 25,142.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

ELLA HUXOLL, ADMINISTRATRIX OF THE ESTATE OF FRED J. HUXOLL, DECEASED,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

WALTER V. HAMGLANT, WILBUR R. COMSTOCK, JOHN F. STOUT, HALLECK F. ROSE AND ARTHUR R. WELLS,
Counsel for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM 1917.

No. 104.

Gen. No. 25,141.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

ELLA HUXOLL, ADMINISTRATRIX OF THE ESTATE OF FRED J. HUXOLL, DECEASED,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

The case is a suit at law under the Federal Railroad Employer's Liability Act of April 22, 1908. In addition to the necessary formal allegations, the substantive averments constituting the cause of action, as set forth in the petition of plaintiff (Printed Record, pp. 2-5.) were as follows:

"Fred J. Huxoll, late of Lincoln County, Nebraska, was on the first day of January, 1911, and at the time of the injuries hereinafter complained of, a locomotive engineer in the employment and service of the defendant, operating locomotive engines which moved the defendant's trains in carrying goods and passengers from and between points in one state to points in other states and in commerce between the states, and said decedent was at the date aforesaid and at the time of receiving the injuries hereinafter complained of, actually employed by the defendant in interstate commerce. The said Fred J. Huxoll died on or about the 2nd day of January, 1911, leaving surviving him Ella Huxoll, his widow, Marian Huxoll, a daughter, then aged two years and seven months, and Frederick A. Huxoll, a son, then aged one year and one month. By reason of the premises the defendant is liable to the plaintiff as Administratrix, for the benefit of herself in her personal right as widow, and the said surviving children, for all damages caused by the fatal injuries suffered by said decedent resulting from the negligence of defendant's officers, agents and employees, and its negligence in its engine, appliances, machinery, track, roadbed and rails, and other equipment hereinafter complained of, under and by virtue of an act of Congress, approved April 22nd, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases."

"The defendant maintains at its station at Sidney, Nebraska freight yards and terminal facilities, including a round house for the repair and housing of its locomotive engines, ash pits, coal chutes, water crane and car tracks, and said station is a division point of the freight service of defendant, at which engines and crews are changed. The defendant negligently located and constructed the said round house, wherein its locomotive engines are repaired and

cared for, in close proximity to its main line track, and on the 1st day of January, 1911, was negligently maintaining and operating the same in close proximity to its said main line track and to its water crane and engine tracks, so that the smoke and steam incident to its maintenance and operation enveloped and obscured its engine and cars passing over said main line track, and obstructed the view of the engine and train movement thereon and upon the side tracks and engine tracks in near proximity thereto and to the said water crane, to the peril of its employes and servants working in and about the said yards.

"The said Fred J. Huxoll was at about the hour of noon on the 1st day of January, 1911, in the due course of his employment and service, ordered and directed by the defendant to proceed to a point immediately adjacent to said main track and in near proximity to the water crane aforesaid, in its said yards at Sidney, to take in charge and operate one of the defendant's locomotive engines eastward from the station of Sidney to the siding called Perdue, for the purpose of moving from said Perdue to Sidney a freight train carrying interstate traffic, that had been stalled and was unable to proceed further by its own engine. The said Fred J. Huxoll, in obedience to said order and in discharge of the duties of his employment, and not otherwise, had proceeded to the defendant's wash house and dressing room provided for the use of its engineers, and had dressed suitably for the duties of said service, and had proceeded thence in the immediate vicinity of said round house by the usual route and way provided for passage by defendant to the water crane, in close proximity to which the engine assigned to him was standing for the purpose of boarding and operating said engine, through a violent snowstorm, high wind and excessively cold weather. The defendant had negligently permitted an accumulation of ice about and in the vicinity of said water crane, and had negli-

gently permitted the said water crane to become so out of repair that it permitted the escape of water on the ground, where it froze and rendered the way slippery and dangerous, making it necessary for deceased's own safety to make a slight detour in his course, and to cross on to the defendant's main line track. While so proceeding from the wash house to the point where the engine assigned to him was awaiting him, the whole course was enveloped in dark clouds of smoke and steam which the defendant negligently permitted to escape from the said round house so negligently located in close proximity to the said main track, water crane and engine track adjacent thereto, and by reason thereof the said deceased was unable to see or distinguish the approach or movement of engines and cars for any appreciable distance. While he was passing around the accumulated ice about the said water crane, the defendant negligently and carelessly, and without warning, backed an ordinary road locomotive engine, which it was negligently and carelessly employing in the switching service at said yards, upon and over the said Fred J. Huxoll, and thereby inflicted grevious and fatal injuries upon his person, from which on the next following day, he died. The said road locomotive engine so negligently employed by the defendant in the said switching service which inflicted said fatal injuries, was so constructed that in moving backwards the view of the track was obstructed by a high and wide water tank, the engines ordinarily employed in said switching service being of a construction that leaves the engineer a free and unobstructed view of the track ahead of him, whether moving forward or backward, a narrow and retreating or sloping water tank being universally and ordinarily employed for that purpose. The locomotive engines in general and common use in such switching service are also constructed with running boards on both ends and on both sides, where switchmen can be sta-

tioned for lookout and upon which persons on the ground may step in event of approach or impending collision with the engine. The said road locomotive engine with which defendant inflicted said fatal injuries, was not equipped either with a narrow and retreating water tank, nor with foot boards or running boards at either end or either side, and the same was negligently employed in said service, for which it was not suitable, or designed, or constructed, and the said Fred J. Huxoll was wholly without warning or knowledge of the employment thereof in said switching service. In the switching of engines and cars generally, and particularly in the said yards at Sidney, the safety of defendant's employes and servants in and about said yards and those called there for any special service, required that a brakeman or servant be stationed in the front end of the head car or engine, for the purpose of keeping a lookout and warning the engineer and those upon the track, of the presence of danger by collision or otherwise, in time to be able to stop the movement of the engine or cars before colliding with any servant or other person in the yard, and in general and common practice a brakeman or other servant is so stationed for that purpose. In the movement of the engine which inflicted the fatal injuries complained of, no brakeman or other servant was placed at the rear of said engine to keep a lookout ahead, according to the movement of said engine, and no foot board or other place of rest was provided by said engine for that purpose, as is provided by the locomotive engines constructed for and in common use in the switching service, but defendant negligently and carelessly failed to so station a servant to keep said lookout or to provide an engine suitably equipped therefor. The defendant at the time of said collision was negligently and carelessly operating said engine in said switching service at a needlessly high and dangerous rate of speed, without

any brake or other appliance with which to stop the same, the brake thereon being then broken, defective and out of repair, without any bell or other device to give warning of the approach thereof, the bell on said engine being broken, defective and out of repair, with the curtain or blind covering the window of the cab of said engine so as to prevent the engineer and fireman in charge of said engine from seeing persons or objects in front thereof, and without ringing any bell or giving any other signal or warning. In switching engines and cars in yards like those at Sidney, the safety of defendant's employes working in and about such yards and those called there for any special service, requires that each engine be so operated as to be able to stop within the distance the track is actually seen to be clear, and in general and common practice in switching operations, such engines are so operated and extra precautions are required and taken, in common and general practice, during foggy or stormy weather, and at points where the track is obscured by smoke and steam. In operating said engine at the time it inflicted said fatal injuries, the defendant and its engine crew in charge thereof negligently and carelessly failed to keep the said engine so under control as to be able to stop within the distance that the track was seen to be clear, and to the contrary negligently operated the same at so high a rate of speed that it could not be stopped within the distance the track ahead could be seen to be clear, nor within a distance of seventy feet beyond any point that could be seen by the engineer or fireman. At the time of said collision and the infliction of said fatal injuries the said Fred J. Huxoll was exercising due care, and the said fatal injuries were inflicted and caused wholly by the aforesaid several acts of carelessness and neglect of the defendant, herein specified and enumerated.

"At the time of his death, said Fred J. Huxoll was capable of earning, and was actually earning in his said employment of a locomotive engineer, the wages of two hundred dollars per month, which he then, and previously thereto, devoted wholly to the support and maintenance of the plaintiff, his wife, and his said infant children, Marian and Frederick, and at and prior to the infliction of said fatal injuries he was an unusually strong, rugged and vigorous man physically, and of the age of twenty-nine years only. By reason of the death of the said Fred J. Huxoll, his widow and his children have sustained a pecuniary loss, injury and damage of the sum of Fifty Thousand Dollars ($50,000)."

The defendant's answer, in addition to a general denial, contained the following paragraphs (Printed Record, pp. 7, 8):

"The defendant admits its status as a corporation organized under and by virtue of the laws of the State of Utah, and as owning and operating a line of railroad, among other places, from Council Bluffs, in the State of Iowa, to Ogden, in the State of Utah, through the city of Sidney, Cheyenne County, Nebraska; and that at all times herein mentioned it was, and now is, a carrier of freight and passengers, among other places, between the points specified; and that it carries interstate commerce, among other places, between points in the State of Iowa and points in the state of Nebraska; and it is further admitted that the deceased, Fred J. Huxoll, was at the time of the accident in question a locomotive engineer in the service of this answering defendant *and that on the 2nd day of January, 1911, he died as the result of such accident,* leaving as his survivors his widow, Ella Huxoll, and the two children specified in the petition.

"And it is further admitted that the defendant, Union Pacific Railroad Company, maintains at its station at Sidney, Nebraska freight yards and terminal facilities, including a round house for the repair and housing of its locomotive engines, and including among other things incident to such yards, ash pits, coal chutes, water cranes and railroad tracks; and it is further admitted that the said station of Sidney, so far as freight service is concerned, is one of its division points at which engines and crews are shifted and changed in the regular course of the Company's business.

"Further answering plaintiff's said petition, this defendant alleges that the injuries complained of therein were not due to any negligence or want of care on the part of this answering defendant, and charges the fact to be that such injuries were the result of the negligence of the deceased himself, proximately causing said injuries, and proximately contributing thereto.

"Further answering, this defendant alleges that the risks and dangers, if any, attending the business in which the deceased at the time of the accident in question was engaged were incident to said business and were open and obvious to him and were such as were known to the deceased at that time, or would have been so known to him had he been in the exercise of ordinary care; and it is further alleged that such risks and dangers, if any, were assumed by the deceased at the time he entered the employ of this answering defendant, and were continuously being assumed by him up to and including the time of the accident.

"And defendant further states that the deceased, at the time of the accident, was walking along one of the tracks in the Sidney yards, which was used in connection with the switching operations of said defendant, and it is further stated by way of defense that the movement of the engine that struck the

said deceased was incidental to the business of railroading, as herein specified, and the risks and dangers of such operation, under the circumstances, were being assumed by the deceased at the time of the accident in question."

The reply was a general denial.

A trial by jury in the District ourt of Lancaster County, Nebraska, resulted in a verdict of $20,000 in favor of plaintiff, apportioned to the three beneficiaries as follows: namely, to Ella Huxoll, widow, $6,668, to Marian Huxoll, infant daughter, $6,666, and to Frederick A. Huxoll, infant son, $6,666. (Printed Record, pp. 56, 57.) A judgment based on the verdict was affirmed on appeal by the Supreme Court of Nebraska. (Printed record, p. 648.)

The controlling question on the present writ of error is: Did the State Supreme Court err in affirming the judgment of the District Court of Lancaster county? Plaintiff in error has the burden here, as it had before the highest court of the state, of showing prejudicial error in the proceedings in the trial court. Whether the highest court of the state was precise and accurate in all of the statements made in its opinion, or whether the reasons assigned for affirmance are in all respects correct, are not controlling in this review. If the proceedings of the trial court, in so far as they interpret and apply the Acts of Congress in question, are free from error, then, as a matter of course the judgment should be affirmed, and it will not be material whether the reasons assigned for affirmance by the State Supreme Court

were right or wrong. The ultimate consideration is whether the trial court committed reversible error; and it is appropriate at the outset to ascertain the precise applications of the Acts of Congress which he made, and the particular issues of fact which the trial judge submitted to the jury.

The exposition of the Acts of Congress applicable, and the definitions of the issues submitted, as made by the trial judge, are embraced in paragraphs 10, 11, 12, 13 and 14 of his charge, as follows:

"10. Plaintiff's petition charges that the deceased Fred J. Huxoll was at the time of receiving the injuries which caused his death actually employed by the defendant in interstate commerce. An Act of Congress relating to the liability of common carriers by railroad to their employes in certain cases, provides that every common carrier by railroad while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road bed, works or other equipment.

"11. A locomotive engineer who, in obedience to a call by the railroad company, has proceeded to the washroom provided by the company at a division station for that purpose, to appropriately dress for service on the engine, and is proceeding thence through the company's yards to board and to take

charge of the engine assigned to him for the purpose of proceeding with said engine to a point on the main line for the purpose of moving a freight train containing continuous shipments of goods destined from a point or points in one state to a point or points in another state, is engaged in commerce between the states within the meaning of the Act of Congress mentioned in these instructions; and within this rule you are instructed that, upon the evidence and the facts stipulated in the course of the trial, the deceased, Fred J. Huxoll, was an employe of the defendant engaged in interstate commerce when he received the fatal injuries complained of in the petition.

"12. The evidence shows, without dispute, that the railroad of the defendant, of which the yard at Sidney, where the accident in question occurred, is a part of a highway of interstate commerce, and that defendant's road engine, No. 213, which collided with deceased, Fred J. Huxoll, was an engine which the defendant used in hauling interstate commerce. An Act of Congress required that such engines be equipped with a power driving wheel brake so that the engineer can control its speed without requiring the use of a common hand brake. The Act of Congress under which this suit is prosecuted, making carriers by railroads while engaged in interstate commerce responsible for injury or death to an employe, resulting in whole or in part, from negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed or other equipment, provides, among other things, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence or to have assumed the risks of his employment in any case where the violation of such common carrier of any statute

enacted for the safety of employes contributed to the injury or death of such employe. If you find from the evidence that the death of Fred J. Huxoll resulted in whole or in part from the negligence of any of the officers, agents, or employes of the defendant, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed or other equipment, alleged or charged in the petition, and that the power brake of defendant's road engine No. 213 was not at the time of the accident in working order and could not then be used by the engineer on such locomotive to control its speed, and the fact that such power brake was not in working order and could not be used by the engineer to control the speed of the engine, contributed to the death of Fred J. Huxoll, then the law is that the deceased, Fred J. Huxoll, cannot be held either to have been guilty of contributory negligence or to have assumed the risks of his employment.

"13. Among the allegations of the petition are the averments that in defendant's switching operations, and particularly in its yard at Sidney, the safety of its employes and servants in and about the yards and of those called there for any special service required a brakeman or servant to be stationed on the leading end of the head car or engine for the purpose of keeping a lookout and warning the engineer and those upon the track of the presence of danger by collision or otherwise in time to be able to stop the engine or cars before colliding with any servant within the yard and that in general and common practice a brakeman or servant was so stationed for that purpose. The petition charges that in the movement of the engine which inflicted the fatal injuries complained of, no brakeman or other servant was placed at the rear or leading end of the engine to keep a lookout ahead and that no foot board or other place of rest was provided on

said engine for that purpose, as is provided by locomotive engines in common use in the switching service, and that the defendant negligently and carelessly failed to so station a servant to keep a lookout or to provide an engine suitably equipped therefor. If you find from the evidence that it was the custom of the defendant Railroad Company, at that time, to have a man stationed on the footboard on the leading end of the engine or cars as a lookout, and that the defendant was guilty of negligence in failing to so station a man as a lookout, and that the death of Fred J. Huxoll resulted, in whole or in part, from such negligence, then the plaintiff would be entitled to recover in this action.

"14. Among the allegations of the petition are averments that in switching engines and cars in yards like those at Sidney the safety of its employes working in and about such yards and those called there for any special service, required that each engine be so operated as to be able to stop within the distance the track is seen to be clear, and that in general and common practice in switching operations, such engines are so operated, and that extra precautions are required and taken in common and general practice, in foggy and stormy weather, and at points where the track is obscured by smoke and steam. The petition charges that in operating said engine at the time it inflicted fatal injuries upon the person of Fred J. Huxoll, the defendant and the engine crew in charge thereof negligently and carelessly failed to keep said engine so under control as to be able to stop within the distance that the track was seen to be clear. If you find from the evidence that the common and general practice in such switching operations was to keep the speed of the engine so under control as to be able to stop within the distance the track was seen to be clear, and that extra precautions were in common and general practice,

required and taken at points where the tracks were obscured by smoke and steam, and that at the time of the casualty in question the engine crew in charge of engine No. 213 negligently failed to keep said engine so under control as to be able to stop within the distance the track was seen to be clear, and that the death of Fred J. Huxoll resulted in whole or in part from such negligence, then in such case, the plaintiff would be entitled to recover in this action."

The academic applications of the Acts of Congress are so true to the intent and letter of the governing statutes that they preclude candid assertion of departures in any particulars whatever.

The quoted instructions left but three ultimate issues of fact to be determined by the jury, viz.

1. Whether defendant, in the conditions shown, was guilty of negligence in failing to station a man on the leading end of the engine, and whether the death of Fred Huxoll resulted, *in whole or in part, from such negligence?*

2. Whether defendant, in the conditions shown, was negligent in failing to keep its engine so under control as to be able to stop within the distance the track was seen to be clear, or in operating blindly next to the spot track, or in failing to take extra precautions at points where the track was obscured by smoke and steam, and whether the death of Fred Huxoll resulted, *in whole or in part,* from such negligence?

3. Whether the power driving-wheel brake of engine No. 213 was at the time of the casualty in

working order, and, if not so in working order, whether such fact *contributed* to the death of Fred Huxoll? The effect of a finding for plaintiff on this issue was to eliminate the issues of "contributory negligence" and "assumed risk."

That all other substantive grounds of negligence were withdrawn, affirmatively appears by paragraphs 15 and 25 of the charge, as follows: (Printed record pp. 47, 49.)

"15. The distance from the main line track at which the round houses of the defendant were located, the elevation of the ground beyond the round house, the tendency of smoke from the round houses to collect about the tracks, and the presence of ice, to some extent, at least, in the vicinity of the water crane, together with the conditions of the weather, as shown by the evidence, are proper subjects of consideration in determining whether the acts of the defendant's servants, on the one hand, and of the deceased, on the other, were such as persons of ordinary care and prudence would have done at the time and under the conditions surrounding the casualty in question; but the incidents just referred to are not, in and of themselves, causes or grounds of negligence upon which a recovery in favor of plaintiff can be had.

"25. The fact that road engine No. 213 was used by defendant for switching purposes at the time of the accident, is not in and of itself, negligence, and a recovery in plaintiff's favor cannot be based upon the fact that such engine was so used. It is proper, however, to take into consideration the type, form and equipment of said road engine and any variance in its equipment from the class and type usually employed in the switching service in determining

whether the acts of defendant's servants, on the one hand and of the deceased on the other, were such as persons of ordinary care and prudence would have done at the time and under the conditions surrounding the casualty in question."

The plain import of paragraphs 15 and 25 above quoted, is to limit the consideration of the jury to the three substantive questions previously stated. These limitations upon the inquiries of the jury were reinforced and emphasized by paragraphs 18, 22 and 23 of the charge (Printed Record pp. 48, 49) as follows:

"18. You are instructed that the mere fact that Fred J. Huxoll was run over by the defendant's engine, would not of itself be sufficient to justify you in finding that the defendant had been negligent in any one of the respects charged in the petition.

"22. You are instructed that the rules of the defendant, which have been introduced in evidence and which require the giving of certain signals on approaching stations and bridges, have no application to this case for the reason that the deceased was not near any station or bridge at the time he received the injuries that resulted in his death, and for the reason that such rules have no application whatever to switch engines and that such rules are withdrawn from your consideration and should not be considered by you in any way in your deliberations.

"23. You are instructed that the rule of the defendant which has been introduced in evidence, and which required trains to stop where required by law has no application in this case, for there is no law of this state or the United States that requires an engine to stop before approaching the place where Mr. Huxoll was at the time he received the injuries which resulted in his death."

There can be no just complaint of the great care exercised by the trial court to limit and confine the consideration of the jury to the particular issues which, in the opinion of the trial judge, were sufficiently supported by proofs to warrant their submission. That extraordinary care was exercised in this behalf, to the extent of making the charge voluminous, is due to the task of steering clear of error in submitting mulifarious details and phases of the evidence, thrown upon the trial judge by the artful presentation by plaintiff in error of forty-seven points and one request for a special verdict (Printed Record pp. 27-39), a proceeding sharply criticised in the opinion of Judge Letton.

The unrevised opinion of Judge *Letton,* found in the record and quoted and commented upon by the brief of plaintiff in error, contains an obvious error, due to some unaccountable oversight, concerning the provision of the Act of Congress eliminating contributory negligence "in any case where the violation of such common carrier of any statute enacted for the safety of employees *contributed* to the injury *or death* of such employee." Comment on the error is pointless, since the very terms of the statute were employed by the trial judge in the charge given to the jury, and an affirmance of that charge could not involve a departure from the Statute. The effect of the error was only to impose a burden on the appellee, as a condition of affirmance, of which the Statute relieved her. The discussion, in the opinion of the State Supreme Court, of whether the evidence could have

justified a finding of contributory negligence, is purely academic, since the issue was actually submitted, on appropriate instructions, by the trial judge.

The State Supreme Court, however, discovered and corrected the error noted before the official publication of the opinion. In the official report is the following language:

"Defendant argues that if deceased was injured by a defective brake the defenses of assumption of risk and contributory negligence are by the federal statute eliminated, and it therefore was prejudicially erroneous to allow this issue to go to the jury. *It is true that the Statute thus provides,*" etc. *Huxoll v. Union P. R. Co.* 99 Neb. 177.

II.

ARGUMENT.

The proofs required submission of the case to the jury, and amply sustain the verdict on every issue presented by the charge of the trial judge.

The brief of plaintiff in error is, for the most part (pp. 14-84), addressed to the contention that the issues submitted were not supported by evidence sufficient to warrant their presentation, nor to sustain a finding for plaintiff. The legal sufficiency of the proofs must be tested by the statutory rules of liability. In so far as the Statute speaks it supersedes the rules of the common law. The Statute is satisfied by proof that the death of Fred Huxoll "resulted in whole *or in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of

any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (8 U. S. Comp. St. An. Sec. 8657.)

The Statute creates a liability where the master and servant are mutually at fault, and where the negligence is that of a fellow servant of the person injured. The rule of *comparative negligence* is substituted for the common law rule of *contributory negligence,* and the statutory doctrine of *comparative negligence* is qualified by the condition that negligence cannot be ascribed to the person injured or killed "in any case where the violation by such common carrier of any statute enacted for the safety of employees *contributed* to the injury or death of such employee." The identical condition which eliminates contributory negligence also eliminates the defense of "assumption of risk." (8 U. S. Comp. St. An. Secs. 8659, 8660.)

In maintaining this contention plaintiff in error, therefore, has the burden of demonstrating that the record contains no proofs to warrant a finding that the injury and death of Fred Huxoll resulted *in part,* from the negligence of any of defendant's officers, agents or employees or by reason of any defect or insufficiency due to its negligence in any of its appliances or equipment.

To maintain its contention that the statutory provision concerning the engine power brakes should not have been embraced in the portion of the charge submitting the issues of contributory negligence and

assumption of risk, plaintiff in error assumes the burden of showing that there was no evidence which, if credited, could warrant the conclusion or inference that there was a failure of the engine power brake which *contributed*, in any degree, to the injury and death of Fred Huxoll.

Humanitarian considerations induced the passage by Congress of the acts in question. An enlightened public sentiment condemned the harshness of the common law doctrines which denied redress for the negligent acts of a fellow servant over whose employment the suitor had no control, which denied redress in cases of the mutual fault of employer and employee, and which left the employer free to select his appliance, without regard to the fact that the progress of his art had developed safer ones. The acts in question are but an expression of this enlightened public sentiment. They give redress for wrongs that were remediless at common law, and give the employer of labor a strong incentive to keep pace with the progress of his art in the adoption of safety devices and safe methods of operation.

Upon this premise, we shall now point out the proofs maintaining plaintiff's cause of action, bringing together, in topical arrangement, sufficient parts of the testimony to support the separate propositions. We shall not much concern ourselves with the consideration of the *weight* or *preponderance* of the evidence, since those considerations are concluded by the verdict and are not open for consideration of this court on the present writ of error.

1. That there were unusual weather conditions, which, in connection with the generation of smoke and steam from the round house and locomotive engines, and the course of the wind downward over the slope of a high hill that arose from the point where the round house was located, enveloped the tracks in smoke and steam to such an extent as to practically obscure them from vision for a space of 200 to 400 feet; that there was a howling northwester, drifting snow, and a temperature of 15 degrees below zero, or colder, are facts definitely proved by numerous witnesses, and practically conceded by both parties. Train movements, in these operating conditions, were perilous to employees upon or near the tracks.

W. A. Borton, at date of accident defendant's yardmaster at Sidney, testified (Printed Record, p. 100), in substance: The weather was extremely cold, with northwest wind and snow, eighteen below zero. Sometimes it snowed very hard. There was a great deal of smoke and steam blowing across the tracks opposite the round house. It came from the round house and engines in different parts of the yard, coal chute and spot track. (P. 101.*) There is a high bluff north of the round house 150 or possibly 200 feet high. (P. 102) Steam and smoke was very dense. You could not see anything at all.

Thomas Orton, defendant's engineer, who was called for the same trip, at the same time as Huxoll, and was close by the scene of the accident, testified (p. 135), in substance: The engines were standing at the water crane north side of the track. Wind was blowing from northeasterly (northerly) direction. Do not know whether directly from the north. The wind was pretty strong. It was snowing and there was

*All record references are to the pages of the printed record.

considerable snow on the ground. Steam and smoke were drifting from the round house over the tracks. The temperature was from 10 to 15 degrees below zero. Could not see distinctly through the steam and snow. There were times when you could see quite a distance, and times when the wind struck the steam that you could not see at all.

B. R. Fletcher, defendant's freight conductor, who at time of the casualty was in the telegraph office, testified by deposition (p. 162), in substance: The temperature was quite cold, at least 10 degrees below zero. Steam in yards was quite bad at the time, covering 100 to 200 feet; a man could not see over 2 or 3 feet. (P. 165, 166) I don't think I was ever before up against such a bad storm and steam. Track (later in same storm) could not be seen at all.

Cloyd M. Johnson, at date of accident, section foreman in charge of Sidney yards, called by defendant, testified (p. 283), in substance: On account of storm had been on duty since about midnight cleaning switches and taking care of emergencies as they arose. (P. 286) The fog was pretty thick, but I could tell where I was going. I could tell which track I was on, or whether I was between the tracks. I could see the rails. I could see the *dark trail* of the rails through the snow. (P. 292) A. It was pretty thick. Yes, sir, indeed it was. Q. It was enough to obscure the view generally, wasn't it? A. Well, yes sir. And then, I could see a certain distance—I could not tell. Q. You knew every inch of that yard, there, at that time, didn't you? A. Yes sir. * * * Q. Your house was in the yard, and your work was in the yard—day and night—where you worked in the yard? A. Yes sir.

Roscoe Zimmer, defendant's engineer who ran engine 213 over Huxoll and killed him, called by defendant, testified (p. 313) in substance: "That I couldn't see," accounts for why I did not see Huxoll on the track. I could not see the rear end of the tank.

I could not see that far. (P. 314) "Q. But you could not see what you were running into? A. No sir. Q. You did not know whether or not you were going to get into anything? A. No sir. I didn't know."

Reference to the five named employes of defendant, representative witnesses of both plaintiff and defendant, will be enough to maintain the position of appellee, without citing to the court less prominent mention of the same facts by other witnesses.

2. It was in evidence that *Fred J. Huxoll,* a road engineer, resident at *North Platte,* and not, like Section Foreman Johnson, domiciled within and knowing every inch of the *Sidney* yards, was obeying an order of defendant which required him to cross these yards in the unusually perilous, confusing and hazardous conditions detailed in subdivision 1 of this chapter. Though not necessary to maintenance of the action, it is also fairly inferable from the evidence that *Huxoll* had assurance that the main line track, on which he was killed, had been assigned to his train and was, at the time, clear. The following record references maintain these propositions:

Exhibit 6, found in the printed record at page 609 is a stipulation signed by attorneys for both parties, which recites that:

"It is by the parties agreed that between the hours of 9 and 10 a. m., January 1st, 1911, Fred Huxoll was called *by the defendant,* at Sidney, Nebraska, to take engine 1909, to leave at 11:10 a. m., and proceed light to Perdue side track to bring into Sidney a freight train. It is further agreed that the engine which Huxoll was to take pursuant to said call,

was headed westward, that is to say, it was to run backwards from Sidney to the freight train above mentioned; and to go with said Huxoll, as conductor, to bring in said freight train was B. R. Fletcher, and the engineer on the other engine was Engineer Tom Orton."

At page 230 of the printed record appears a stipulation made *ore tenus* at the trial as follows:

"It is stipulated and agreed that Fred Huxoll, at the time of accident in question, *was proceeding to his engine,* number 1909, for the purpose of moving the engine light, *in pursuance to a call* of the defendant, from Sidney to Perdue, for the purpose of there connecting with and pulling a train from Perdue to Sidney. That the train which he was sent to move, with the engine 1913, contained goods for continuous shipment between points in one state to points in other states. That the time assigned to Fred J. Huxoll for the departure of his said engine was 11:08 a. m."

Order No. 36 for this service was produced by defendant's dispatcher, *William Hawley,* and read in evidence (p. 234) as follows:

"36. 1-1-11. (Jan. 1, 1911.) Order No. 36, 19 c. d. (form 19, address Sidney). c. e. (conductor and engineer) Eng. 1913. 56 X. (operator hold order till completed or reported) 11:07 a. m. to 19 c. q. (19 form order addressed to Chappell) all east 11:08 a. m. Eng. 1913 run extra Sidney to Perdu, and run extra Perdu to Sidney. Has right over all eastern trains Sidney to Perdu. No. 56 Perdu to Sidney."

It was expained by the dispatcher that 56 is a regular train which has right over extras, "and in order to get the *extra* back to Sidney, we would get them to move 56 on." * * * "The orders are only given to the head engine, and the *head engine is men-*

tioned in the order given to both" (p. 235). So Huxoll was given an open road and right of way in both directions. The dipsatcher further testified (p. 235): "Q. Did the engineer have the regular engines at that time? A. I believe they did. But the circumstances didn't allow them to be on their engines very long, on account of the weather."

B. R. Fletcher, conductor, explained that the place of reporting for duty was the telegraph office, where the conductors and enginemen signed the train register. Fletcher reported for this particular trip on which Huxoll was assigned to duty as one of the engineers at 10:40 a. m., and then learned who composed the engine crews (pp. 158, 159).

3. It was abundantly proved that, both in theoretical and practical railroading, the ordinary rules and methods of operating have no application to train and engine movements in conditions which obscure the tracks from the vision of the engine crew, and in the weather conditions existing at Sidney at the time of the accident. It was shown by practically all of the railroad witnesses that the proven conditions made the engine and train movements perilous to employees in the yards, and demanded extra and special precautions, and the exercise of the best judgment of the engine and switching crews, so that they would not run into anything or anybody. There was a difference of opinion as to the particular extra precautions requisite to safe and prudent operation in such conditions, but none upon the proposition that those conditions rendered extra care and caution imperative, and rendered inapplicable the ordinary operating methods.

W. A. Borton testified (pp. 102, 103):

"Q. On the first day of January, 1911, you were the yardmaster at Sidney yards? A. Yes sir. Q. And had control of the movements of engines and trains in the yards? A. Yes sir. Q. They were controlled and operated under your direction and instructions? A. Yes sir. Q. Now what were your instructions in the operation of engines in stormy and foggy weather in the yards at Sidney, generally, when the clear view was obstructed? A. In the operation of the yard, the yard crews were always allowed certain latitude, and *they are presumed to move cautiously whenever it is necessary and in case of storms, the engines are operated carefully.* Q. Slowly? A. Yes sir. They go, *if they know everything is clear,* they of course go faster. And if they know the tracks are not clear *it is necessary to feel your way along;* and at other times you move faster. And it is a matter that is rather left to *the man on the ground,* and *the man in charge of engine.* * * * Q. Well, were the instructions affecting speed in stormy and foggy weather changed? A. As I said before, there was a certain latitude allowed the men in stormy weather. They were presumed to use their own judgment, *and were presumed to be competent to use their own judgment;* and when it was necessary to run cautiously, they were presumed to do so. Q. But were there *instructions* with reference to the movement of engines or trains in foggy and stormy weather? A. I presume that there were general instructions that in foggy and stormy weather the men in charge of the engines were to move cautiously. *That was understood.* * * * Q. Was it a general custom and practice and understood to be? A. Yes sir. Q. Now, Mr. Borton, in this same deposition to which attention has been heretofore called, wasn't this question put to you: 'Were there any instructions affecting the speed in stormy or foggy weather?' And to which

question didn't you answer: 'Yes sir, there were instructions?' A. Didn't I answer the same thing here? *I said I presume there were instructions.* * * * Q. Now what were those instructions? A. The instructions were, in case of extraordinary weather the engines should be handled carefully, and to move cautiously when necessary, and there were instructions—I don't know exactly the nature of the instructions. It is simply a matter that is understood. * * * (p. 77) A. * * * And I have told you that in stormy weather the engines were supposed to move cautiously, and in case of foggy and smoky weather, that they were supposed to move through they would slow up and move cautiously. (P. 105) Q. What I want to ask you particularly about, Mr. Borton, is, if the necessity of certain rules in the operation of engines is not universal? (P. 106) A. I believe that those rules are made by what is known as the American Railway Association, of which nearly all railroads are members. Q. And similar precautions obtain in most of the yards in the operation of engines when the tracks are obscured. A. I could not say as to what the *specific* instructions are on all railroads. I presume there are such instructions. Q. Now I want to ask you, Mr. Borton, what was the custom in the *Sidney yards,* of operating engines there in stormy and foggy weather when the track was obscured? A. The men were told to move cautiously. *I remember distinctly of telling the yard crew.* The biggest part of the time I (was) on the yard engine myself; *and I told them to move carefully through that bank of steam and smoke and not get into anything.*''

The effect of the railroad company's transportation of Borton some hundreds of miles and producing him in court was to prevent reading his deposition, which the examination indicates to have been more

favorable and more spontaneous, in some particulars, than his testimony given in the trial. The difficulty of compelling a disclosure of his instructions to the yard men, and the witnesses' disposition to equivocate and parry inquiry into the specific instructions which he gave his men, were sufficiently overborne to elicit the knowledge that he called particular notice of his yard men to the "bank of steam and smoke" in which Huxoll was unavoidably enveloped, and told them to move through it carefully "and not get into anything." In the face of his quoted testimony, it is idle to contend that the ordinary rules and precautions of operation in the yards were applicable to the extraordinary conditions existing when Huxoll was killed.

We do not overlook the concluding question put to this witness when recalled by defendant (p. 795), which, with the answer, follows:

"Q. What was the practice or custom with reference to having a flagman or switchman on the front end of all engines switching in the yards, on the leading end of the engine, *in order to flag the engine through steam or smoke or storm?*

A. We never put a man there *for that purpose.*"

It will be seen that the *qualification stated* in both *question* and *answer,* was the employment of an art that destroyed all force of the testimony. There may have been some, or many reasons, why the stationing of a man on the foot board at the leading end of the engine was practiced. Whatever the reason assigned for such custom or practice, Huxoll was entitled, in the operating conditions shown, to such protection as the customary presence of the man at that station

would afford. It does not meet the issue to state that the man was not put there "for that purpose." The answer does not negative the proposition that a man should have been so stationed, and that a failure to so station him was negligence, which caused, in whole or in part, Huxoll's death.

R. B. Fletcher, defendant's conductor, testified by deposition. Some material questions were excluded because they were in form to elicit the precautions which the *witness* took in going through such steam and smoke and storm and fog as obscured the track when Huxoll was killed. From *Fletcher's* deposition the following qualifying testimony was read (p. 166):

"Q. You may state whether or not the precautions which you took in going through the steam and storm at this time, in the Sidney yards, were the usual precautions taken by the Union Pacific's employees? A. Well the instructions. I can't say what other people do. Q. These were the ordinary precautions, which you observed, in going through places like that? A. Yes sir."

Upon this foundation plaintiff re-offered the rejected questions and answers, not upon the theory that the particular things *done by Fletcher* were, in themselves, the proper criterion of due care, but that with the explanatory and qualifying statements, they showed clearly the witness's statement of what, in common practice, was done in such conditions.

The following is a part of the deposition received, with notation of particular answers rejected (pp. 163-165):

"Q. Did you come through that steam with the train? A. No, not with the train. Q. Did you go through with an engine? A. Yes. Q. What engine? A. Both engines, 1913 and 1909. Q. Who was in charge of the crew and engine? A. I was in charge of the crew. Q. What precaution did you take? A. (Excluded on objection that it was immaterial). I used a fuzee. And brakeman *walked* side of track through the steam, *ahead,* to prevent any train or engine coming against us. Q. As I understand it, you flagged ahead? A. (Rejected on objection.) Yes sir. Q. Did you go through the steam in the Sidney yards at any other time during January 1, 1911, other than the time you testified, with an engine? A. Yes sir. Q. What, if any, precautions were taken at that time by the crew in going through the steam? A. *Flagged through, same as before.*"

Charles B. Matthews, fireman on the engine that killed Huxoll, testified in part as follows:

"(P. 176) Q. Were you, Mr. Matthews, on the first day of January, 1911, acquainted with the custom and practice of operating switch engines in the yards of the Union Pacific Railroad at Sidney, Nebraska? A. Yes sir. Q. Were you on that day, acquainted with the custom and practice in the Sidney yards of the Union Pacific Railroad with reference to having a switchman or other lookout on the footboard of a switch engine while operating in the Sidney yards? A. Yes sir. Q. Now you may tell the jury what that custom was on that day in the particular of a switchman, *or lookout,* on the footboard, Mr. Matthews. A. The custom is to have a switchman at the front end of the engine, *in the direction it is going.* Q. You use the word 'is,' the custom 'is?' A. Why, it was at that time. * * * (P. 177) Q. And now, then, just tell the jury about what the custom is when you are backing up, or when you are going ahead, whether it applies equally both ways?

A. If you are backing up the switchman is supposed to be on the back end. Q. You have reference, in speaking of that custom, to the time that Mr. Huxoll was killed, do you? A. Yes sir." (Reiterated at page 185 of Printed Record.)

At pages 187 and 188 is Matthews' testimony that he had previously been given general instructions in the Sidney yard by the examining crew of Union Pacific Railroad and was familiar with the operation of trains and engines. He was then questioned and answered as follows (p. 188):

"Q. Now what was the general practice and custom in reference to flagging through smoke and steam which was sufficiently dense to obscure the enginemen's view of the track ahead? A. *The custom was to stop and send a flagman ahead.*"

It cannot be insisted, with candor, in the face of the foregoing testimony, that there is no evidence in the record to sustain the propositions, (1) that it was the common practice in yard movements to station a man on the leading end as a lookout, and (2) that it was the practice in extraordinary conditions of storm, steam, smoke or fog, sufficient to obscure the track from the vision of the enginemen, *to send a man ahead to flag through.* The weight of the testimony is for the determination of the jury, and not of the appellate court, and the finding of the jury in plaintiff's favor on these issues, on the testimony pointed out, is conclusive on the questions of fact. Proof of such well known and available methods is competent on the issue of whether the perilous situation should not require their use, regardless of ordinary operating usage.

In addition to the foregoing, the testimony of *Roscoe Zimmer,* the engineer operating engine 213, at the time it killed Huxoll, is as follows (pp. 322 323):

"Q. There was no flagman running ahead to keep you out of trouble, when you could not see the track? A. No sir. Q. Now you had started on a trip away out west that would take you clear across Rose street? A. I don't know. Q. You would have no knowledge of that because you moved only upon a signal from a switchman or a switch engine foreman? A. That is all, yes sir. Q. And how would you get a signal if the conditions were such that you could not see the switchman who was to give you the signal—would you move your engine then, or not? A. Why *I would't move, no, until he gave me a signal to move and I could see the signal to move.* Q. And if you could not see, he would have to come where he could tell his order orally? A. *I would have to see the signal before I would start.* Q. You sometimes take them orally, I suppose. A. No, they always work by signals. Q. If you had operating conditions under which you could not see the track ahead, and could not see the switchman who gave the signals, then you would not move your engine, would you? A. *No sir, not if I could not see him.* Q. Under what circumstances would you operate in the yards there at Sidney, when you had no man stationed on the leading end whose signal you could take, and no flagman on the ground to give a signal or warning if you were running into something? And where you could not see any portion of the track onto which you were running, ahead? Would you move at all under those circumstances, ordinarily? A. Yes sir, I would move under precaution. Q. How would you know, under those circumstances, whether or not you were running into something? A. Well, *I would*

not know, but I would be moving cautious. Q. You would just simply take your chance and stop when you heard something grind under the engine, or when you came against something? A. If I thought there was something wrong, I would stop. Q. Well, you would not know there was anything wrong under those conditions, until you ran into it? You would absolutely have no means of knowing when you were proceeding against something or not? A. No sir."

It is too plain for disputation that the exigencies encountered in the movement of engine 213, in question, when considered in connection with the necessities and customs for safe operation in such conditions, as detailed by *Zimmer,* and by *Fletcher* and *Matthews,* make the issues of whether it was negligent to run through the conceded bank of steam and smoke and drifting snow and fog, without a switchman or lookout on the leading end, and without a flagman running ahead, questions of fact for the determination of the jury. *Zimmer* showed clearly that the conditions encountered called for extraordinary precautions. The circumstance that he also testified that the yard master or engine foreman had not given him any man to flag through the darkness, notwithstanding his engine had no head light on the leading end, does not change the character of those issues as questions of fact. It was for the jury to say, upon all the evidence, which of the witnesses spoke the truth; and whether the obvious perils of the extraordinary conditions which caused the yard foreman to give special instructions to guide the yard crews in those conditions, did not, upon the customs of operation de-

tailed, require the additional precautions of a man on the leading end, or a man on the ground to flag through the darkness. It was for the jury to say whether either of these precautions would have saved Huxoll, or whether their negligent omission was, in whole *or in part,* the cause of his death.

Extraordinary operating conditions were graphically detailed by the witnesses. The quoted testimony of *Roscoe Zimmer,* the engineer who ran his engine upon Huxoll, advanced the proposition that the engine in his charge *should not move at all,* in operating conditions which completely obscured the track and prevented his seeing signals—a proposition that appears to be self-evident. It was admitted that the order of the master required *Huxoll,* and all members of the train crew and two engine crews, to reach the engines on the spot track immediately adjacent to the point of the accident. The train order apparently gave the track to Huxoll. These proofs of operating conditions, of the known and available expedients necessary to be employed therein, and of the master's order for the assembling of its servants at the point of the accident, and its consequent knowledge of their presence, presented the question of whether, in the admitted absence of a head-end man or lookout, or a flagman walking ahead, to flag or *feel* the way through, as different witnesses termed it, any engine movement was not negligent. That issue, also, was for the jury.

Meriam W. Riggs, the only one of the three members of the switching crew, who accompanied engine

213 on the fatal trip in question, and who rode in the protection of the gangway, and avoided the exposure to the weather incident to riding on the end, testified, in part (p. 449):

"Q. I want to know how you make the movements of your engine safe when you have no view of the track, and nobody ahead to warn, and no flagman ahead to call to you if there is danger encountered? How do you protect yourself from collision in cases of that kind? A. We go through *guarding* ourselves. Q. Well, how do you guard yourselves? A. Go through the smoke and steam slowly."

The proposition on which Riggs stood was then put to him on cross-examination in the following interrogatory (pp. 449, 450):

"Q. And in all conditions of that kind, in your customary switch movements in those yards, when you can't see at all what you are getting into, you move the engine, just the same, and when you find you have had an actual collision is when you stop?"

The proposition may have been an argumentative deduction, and a ruling sustaining an objection not prejudicial; but it stated the unavoidable end of the theory advanced by the witness. The testimony quoted indicates that, in *Riggs'* opinion, the extraordinary conditions made some sort of extra precaution imperative.

The qualified denial by Borton of the custom of stationing a man on the leading end in yard movements, which involved a negative pregnant, and, therefore, only a denial that the *purpose* of so stationing him on the leading end was *to flag through*

steam or smoke or storm, was characteristic of the examinations conducted on the question by defendant's attorney. The inquiry on this issue to *Cloyd M. Johnson,* the section foreman in the Sidney yards, with the answer, is as follows (p. 284):

"Q. In switching there in the yards during all the time that you have been there as section foreman, did you ever see any switchman riding on the front end of the engine, *flagging the train through the yards or through any steam or through any steam or smoke that was there in the yards?* A. No, I didn't."

The qualification put in the question not only involved a negative pregnant, but it overlooked the circumstance that, in order to flag the engine through, the man must jump to the ground, walk ahead of the moving engine, and either call "all right" or signal "all right," to the engine which follows. We now quote a question and answer of the same witness from his cross-examination at page 290:

"Q. Even though there was no headlight ahead, on the leading end, and there was total darkness, you never saw, in any condition, in your life, a man flag an engine or car through? A. Not in the yards, *unless he was on the main track,* and on some passenger train's time; and then I have, *flagging against first-class trains."*

The corresponding inquiry made by defendant of *John A. Nicholson,* district foreman in charge of the Sidney round house, was as follows (p. 431):

"Q. Do you know whether or not there was, or was not, a custom or practice, in that yard, on January 1, 1911, or prior to that time, of having any

switchman riding on the leading end of the engine through the yards, *for the purpose of warning or giving warning to the engineer of obstructions upon the track, or flagging the engine through steam or smoke?* A. No sir, there was no practice, that I knew of or observed. Q. Did you ever see that in the yard prior to January 1, 1911? A. *I have seen switchmen riding on the front end*, but I have never seen any of them *doing any flagging.*"

This course of examination was a mere art employed by counsel to conceal the unwillingness of defendant to undertake an unequivocal denial of the operating customs, particularly in the conditions described, of having a man ride on the leading end, and, when darkness obscured the tracks from the vision of the engineer, having a man walk ahead, on the ground, to flag through the darkness. Defendant chose to risk the art of a negative pregnant rather than to assume the burden of unequivocal denials of the existence of these customs.

There were extraordinary dangers presented by the unnsual operating conditions. Defendant's witnesses expressly acknowledged the use of the expedients suggested, under like conditions, *in train operations.* Witnesses called by plaintiff testified, unequivocally to their employment, in such conditions, *in yard operations,* as we have shown by record references. No reason has been suggested why they should not be availed of in yard movements, in the extreme conditions of danger existing. The most that counsel can claim, if they remain faithful to the record, is that there is a conflict between the witnesses for

plaintiff and defendant; and a mere conflict of testimony presents, not an issue of *law*, but one of *fact*, on which the decision of the jury is conclusive.

4. It was abundantly proved that, in the movement of the engine which was fatal to Huxoll, the yard crew proceeded blindly, and employed no known methods, of any kind, to protect the engine or to learn whether it was running into anything, o whether the track was clear or obstructed, through conditions of extreme peril that were well-nigh u precedented. To this effect the following testimo was delivered:

Meriam W. Riggs, the sole member of the switching crew accompanying the engine, testified, in part (p. 441):

"Q. Did you see Huxoll on the track before you hit him? A. No sir. * * * Q. Did you look up the track to see if anyone was there? A. I could not say. Q. I asked if you looked? A. I was looking that way all the time. Q. And you could not see the track or any portion of it at all times? A. Not after we got into that smoke and steam. Q. It did no good to look under those conditions from where you were standing? You could not get any knowledge of any danger, to indicate it by any signals to the engineer? A. Not when I could not see. Q. *So as you were operating then*, the only way that you could tell of the presence of any obstruction on the track *was when you came against it?* A. *It is true.* Q. You were the only switchman accompanying the engine? The only person about the engine crew at that time? A. Yes sir. Q. And you weren't on the end of the engine? A. No sir. (P. 442) Q. You were on the steps that led * * * between the tender and

cab? A. I was. Q. The coal box and the water tank were on the leading end from where you stood? Were they? A. Yes sir * ** (p. 442.) Q. Then the steps where you stood were 26 feet from the leading end of the engine? A. Yes sir * * * Q. Then in giving the signal which you gave to Zimmer (to stop) you acted upon a warning received from the jolting of engine, which had previous run over something, or else jumped the rails? A. I yelled at him to stop. Q. Well, I say, you relied upon the sensation of movement, jolting of the engine? A. Jolting of the tank. Q. That is what gave you the information that there was something wrong, upon which you gave the signal? A. Yes sir."

Riggs had previously testified:

"(P. 439). Q. Well, you were the fellow giving the signals? A. Yes sir. Q. And he would go simply as you directed him? A. Yes sir. * * * (p. 440). Q. Then, as a matter of fact, you controlled the movements of this engine on this track, did you? A. By signals."

The following testimony of Switchman *Riggs* presented a question for the jury touching the weight of his testimony concerning the condition of repairs and operating efficiency of the locomotive 213:.

"(p. 441) Q. You didn't know that, at or about 8 o'clock, that air brake was totally disable for efficient work? A. No, I didn't. Q. And when you came up with the engine, from the first movements that that brake was so that it would not take hold? You didn't know that fact, did you? A. No, sir. * * (p. 443) Q. And the wind was blowing, so that you attribute your failure to know about the using of the torch to warm up the air brakes to the fact that you were in getting warm? A. Yes, sir. Q. When your duty to be outside was not imperative—to be in the

yards there—you would be roasting your shine at the furnace? A. *You bet.*"

Roscoe Zimmer, engineer operating engine 213, testified in part:

"(313) Q. How do you account for the fact that you didn't see that Huxoll was on the track? A. That I couldn't see. Q. How far could you see the track ahead to be clear? I mean towards the leading end of your engine? A. Towards the direction we were going? Q. Yes, sir. When you struck Huxoll, how far could you see the track at the rear of your engine? The clear track? A. I could not see the rear of the tank. I could not see that far. Q. As far as you were going, then, you were just going blind, without knowing what you were running into? That is a fact, isn't it? A. Well, we were backing up the main line slow and carefully. (p. 314) Q. But you could not see what you were running into? A. No, sir. Q. You did not know whether or not you were going to get into anything? A. *No sir, I didn't know.*"

After testifying (pp. 321, 322) that the switching crew consisted of three men, *Zimmer* testified further (p. 322):

"Q. And the only one of these three with the the engine upon this trip was Riggs? A. Yes, sir. Q. And he stood in the deck, or upon the steps at the deck, between the engine and the tender? A. Yes, sir. Q. So that, then, there was no man stationed at the leading end on a footboard there? A. No, sir. Q. There was no flagman running ahead to keep you out of trouble when you could not see the track? A. No, sir."

We refer at this point to the testimony of *Zimmer,* previously quoted, to the effect that he would not move his engine at all, in weather conditions which ob-

secured the track and when he could not see or receive the signals from the switchman; and to the further effect that he was moving, when he hit *Huxoll*, with obsolutely no means of discovering whether he was running into anything, *except the impact of a collision.* (Printed Record, pp. 322, 323).

Charles B. Matthews, the fireman on engine 213, was the only other man conected with the movement of the engine that resulted fatally to Fred Huxoll. Matthews testified, in part as follows:

"(pp. 182, 183) Q. What, if anything, had the engine number 213, upon which you were then working as fireman, to do with this injury? A. It ran over Mr. Huxoll. Q. Were you riding upon it as fireman at the time it ran over him? A. Yes, sir. * * * Q. Were you proceeding forward, or backing up? A. We were backing up. Q. Was there, or wasn't there, any person on the footboard of this engine to keep a lookout? A. There was not. Q. Was the bell ringing at the time you struck Mr. Huxoll? A. No, sir. Q. Where were you coming from, with this engine, at the time Mr. Huxoll was run down? From what part of the yards? A. We were coming from the east end of the yards at Sidney. Q. And you were proceeding in what direction? A. west. Q. Tell the jury whether or not the whistle of this engine was sounded from the time you started on this course that you were pursuing, when Huxoll was run down, or before you started up to the time you struck Mr. Huxoll? A. No, sir. Q. Was it, or wasn't it, sounded? (p. 184) A. It wasn't sounded. * * * * A. The weather was cold, and steam and smoke—— Q. Now, to what extent was there steam and smoke at the point, and near the point, where Mr. Huxoll was struck? A. Why it was dense. You could not

see. * * * Q. How far could you see the track ahead of your engine? A. We could not see it at all. * * * Q. Do you know, Mr. Matthews, whether the window in the cab on the engineer's side of this engine—the side window of the cab—was open or closed at the time Mr. Huxoll was run down? A. Yes, sir. Q. Was it open, or closed? A. Closed. * * * (p. 185) Q. Do you know whether or not the window in the side of the cab, on the fireman's side, was open or closed at the time Huxoll was run down? A. It was closed. * (Speed of engine was 8 or 10 miles an hour, more or less.) (p. 186) Q. When did you first discover that this engine had run over Mr. Huxoll? A. When I heard somebody holler. * * * (p. 187) Q. Do you know about how far this engine ran after you heard somebody holler? A. Yes, sir. Q. About how far? A. About 30 or 40 feet. (p. 188) (It was Fireman Dupont who hollered. He had his head in the cab of the engine and told us to stop. We had run over his engineer.) (p. 188) Q. Mr. Matthews, do you recollect whether or not the curtain or blinds in the back of the cab were open or closed at the time this engine ran Huxoll down? Q. Yes, sir. Q. Now state to the jury whether or not they were open or closed? A. Closed. (p. 189) Q. What kind of blinds were they? A. It was a common piece of canvas that goes straight across the back of the cab. Q. Could you see through it? A. No sir. (p. 200, cross examination) Q. Where was Engineer Zimmer at the time you first knew you had hit somebody? A. He was on his side of the cab. Q. Standing up or sitting down? A. Standing up. Q. You are sure the window was closed on his side? A. Yes sir. Q. You took particular notice of that. A. Yes sir. * (p. 203.) Q. Now, as you approached this cloud of steam did you slow up any? A. No, we did not. Q. You did not? A. No sir. * * * Q. Were you running, at the time just before the accident and

just before you went into this cloud of steam, with any extra precaution, or more carefully than usual? A. No sir."

5. The incidents of the particular location of the round house with reference to the main line track, the variance of the style of the engine from the usual type of a yard engine, and the existence of ice about the water crane, which were withdrawn as grounds of negligence, but allowed consideration for what they were worth in determining whether the defendant's employes, on the one hand, or the deceased, on the other, were in exercise of due care, were all the subjects of ample proofs. In the foregoing review, proofs of the extraordinary conditions as to weather, storm, smoke, steam and fog, and the placing of the round house against a high hill, so that the north wind would blow the steam and smoke downward upon the cars and tracks, have already been sufficiently exploited for the purpose of justifying the court's instructions on that head. At page 98 of the printed record is a stipulation made, *ore tenus,* by which the parties agreed upon the precise location of practically all the equipment and fixed yard appliances.

Touching the usual type and equipment of yard engine, there was the following testimony:

W. A. Borton, the yard master, testified, in substance (p. 133):

"Engine 213 was a road engine. Q. And is a road engine used for both road and yard purposes in switching? A. They are, *in emergencies.* * * * Q. In the Sidney yards they were used only in emergencies? A. Yes sir."

Merian W. Riggs, switchman, testified:

(p. 446) Q. Ordinarily you have a switch engine with a headlight on both ends? A. Yes, sir. Q. To give you a view of the track, whichever way your switch engine is going? A. Yes, sir. Q. Now, in cases where the track is obscured by smoke and steam and fog, don't the night rules obtain in switching in the Sidney yards? A. The rules are the same at day and night. (The rules to this effect are copied, following the present excerpts from Riggs' testimony.) (p. 452) A. The regular switch engine has footboards and grab irons. Q. On both ends? A. Yes sir. Q. And headlights on both ends? A. Yes, sir.

(Rule 18 p. 517) Yard engines will display the headlight to the front and rear, by night. When not provided with a headlight in the rear, two white lights must be displayed. * * *

(Rule 9, p. 513) Night signals must be displayed from sunset to sunrise. When weather or other conditions obscure day signals, *night signals must be used in addition.*

Roscoe Zimmer, the yard engineer, testified (p. 320, 321):

"Q. Now isn't it a fact that it was the common and general practice in that Sidney yard, and elsewhere that all engines assigned to switching service should be equipped with head lights, foot boards and proper grab irons, at both ends? A. Yes sir. A yard engine is supposed to have a head light at both ends, and grab irons at the back and front of the engine. Q. And foot boards also? A. Yes sir. * * * Q. * * Was the engine 213 that you were using at the time of the Huxoll accident equipped with a foot board on each end? Right at the end of the engine? A. Not a foot board that ran across the engine. No sir. Q. Did it have a foot board at either end? A. Well.

it was about the same in front as it is behind. Q. Well, you know what I mean by a foot board—it is a board that runs across the end? A. Well, *there was none on there.* Q. Did engine 213 have a head light at the rear that you could turn on when you backed into this steam and smoke? A. No sir."

Charles B. Matthews, the yard fireman, testified:

"(p. 175) Q. Can you describe to the jury the general construction of the switch engine ordinarily and generally used in the Sidney yards on the first day of January, 191., for switching purposes? A. Yes sir."

Without repeating all the examination he then gave a description of the switching and yard engine substantially as follows: (p. 175):

A regular switch engine is smaller in size has a low tender and a foot board on each end; two head lights, one in front and one on the back. One foot board is placed in front crosswise of the track, about a foot from the ground and one in back the same way, extending the whole rear and front of the engine. Q. State to the jury whether or not the engine No. 213 was equipped with foot boards? (p. 176) A. It was not. Q. State whether it had foot boards on either end? A. It did not.

That there was some ice about the water crane, which Huxoll would have encountered if he had walked further between the main line and the spot track (on which was his engine) was abundantly proved, and can hardly be said to be the subject of controversy. To this fact there was the following testimony:

W. A. Borton testified:

"(p. 100) Q. There was some ice there? A. Yes sir. Q. Now in what direction from the water crane did this ice extend? A. Well, it was just little splashes, down between the platform and the track, clear around the water crane. Q. *Clear around the water crane?* A. *Yes sir.*"

Charles B. Matthews testified:

"(p. 184) Q. How close to this water crane is the main line track in the Sidney yards? A. About 6 or 8 feet. * * * (One of the engines was located just north of water crane on spot track, and one was ahead of that one and one behind it.) (p. 178) Q. Do you know whether or not on that day and at the time, Mr. Huxoll was injured, there was any ice about this water crane? A. Yes sir. Q. Now tell the jury whether there was or was not ice about the water crane at that time? A. There was. Q. In what quantities? How much, and what area was covered with it? A. I could not state. *It was all around the water crane.*"

Cloyd M. Johnson, the section foreman, testified there would always be some leaking or dripping of water when the crane was use, and further:

(p. 289) "A. It all depends on the man who is watering the engine? Q. Yes sir. And then, in all cases some leaking is involved in the working of those valves. A. Yes sir, there must be some. Q. And, of course, then, water leaked that morning and froze didn't it, in a very short time? A. Yes sir. Q. It didn't run away? A. No sir. Q. Not in weather that is 15 degrees below zero? A. No sir. Q. And it froze just wherever it happened to fall? A. Yes sir."

6. The proofs clearly and plainly presented the issue of whether the power driving wheel brake of engine No. 213, was in efficient repair and capable of being used at the time of the casualty.

Charles B. Matthews, the fireman of engine 213, testified to this issue, in part, as follows:

"(p. 178) Q. Do you know, Mr. Matthews, the condition of the brakes and braking appliances of this engine, number 213, at the time Mr. Huxoll was injured? A. Yes sir. Q. State to the jury what the condition of the brakes and braking appliances on that engine was at the time Mr. Huxoll was killed? (p. 179) A. It was not in working condition. Q. Now, tell the jury, Mr. Matthews, in what particular they were disabled and what made them not in working condition. A. The air pump was not working, and we would not use the brakes. Q. What was the condition of the air on this engine at the time Huxoll was hurt? A. We had no air on the engine. Q. What was the matter with the air? A. The air pipe was froze. Q. How is air produced on an engine? (p. 180) A. I cannot explain because I never had experience enough on that. * * * Q. Now, what was the condition of this engine number 213, at the time Mr. Huxoll was injured, in reference to whether or not the bell was in condition to be used and operated? A. It was not. Q. What was the matter with that? A. The bell cord was broke in two, and I could not ring the bell from the cab. And the automatic steam bell was not in working condition. Q. What was the matter with the automatic bell? (p. 181) A. It was froze. Q. When did you first discover, Mr. Matthews, that the automatic valve to control the bell was frozen? A. I could not tell exactly. It was sometime that morning. * * * * (p. 182) Q. What appliance, if any, is there on this engine, or was there, on this engine, to stop it when

it was in motion, otherwise than the air brakes that you said were out of order? A. That engine? Q. This 213, that you were working on as a fireman, on that day? A. There wasn't anything that I could see. (Question repeated and answered) A. The lever. *The reverse lever was the only thing there was to stop it with.* (Cross-examination, p. 206) Q. Now, you will have the jury understand that the valve froze up so that the *bell ringer* would not work? A. I do not know whether or not it did, or what was the matter of it; but it was not in working condition. Q. Then you now mean to say that you do not know whether it was froze or what was the matter? A. I never examined it. (Question read,) I say it was not in working condition. (Question read.) I do not know. * * * (p. 207) Q. You cannot answer now as to whether you still say it was frozen or not? A. I cannot say positively it was froze; but I know it was not working. * Q. Now, as a matter of fact, wasn't there on that engine 213 that morning, a straight air brake and an automatic air brake? A. There was. Q. Which one do you say was frozen? (p. 208) A. Both. * * * (p. 226) Q. Mr. Matthews, at the time you took this engine in the morning at six o'clock, on the first day of January, 1911, what was its condition, then, with reference to the steam pipe that operated the air pump being frozen up or otherwise? A. Why they were not in working order on account of the pump not having steam to run it. Q. Why didn't it have steam to run it? A. Because the steam pipe that connects with the pump was froze. Q. Now what, if anything, did you and Mr. Zimmer, your engineer, or either of you, do to try to thaw it out? A. We had waste and coal oil. Q. What did you do with the waste and coal oil? A. We tried to thaw it out. Q. How? A. With a fire. Q. Were you—did you accomplish it? A. No sir."

In quoting the foregoing, we do not overlook the circumstance that the witness, at the outset, avowed his inability, for want of sufficient experience, to explain the technical operation of the air brakes; nor that he confessed on cross-examination that he could not specify, particularly, that the valve of the bell ringer was frozen, although *he did know* the appliance was not in working condition. Counsel took advantage of the circumstance that this former employe of the company was not possessed of technical knowledge, to close the cross-examination facetiously as follows:

"(p. 229) Q. Now you say that the steam pipe was froze on this 213? A. Yes sir. Q. Where does that steam pipe run? From where to where? A. It runs along side of the boiler. * * * Q. Under the jacket? A. Yes sir. Q. Right up against the boiler? A. No sir. Q. Where? A. About 4 or 5 inches from the boiler. Q. From the side of the boiler, the top or the bottom? A. The side. Q. What does it run to, or where does it run from in the first place? A. It is connected with the boiler and the air pump. Q. One end is connected with the live steam pipe in the boiler? A. Yes sir. Q. And the other end is connected with the air pump? A. Yes sir. Q. And it runs along aside the boiler? A. Yes sir. Q. What do you mean by live steam? Explain that to the jury. A. Well, it is hot, I guess. Q. It is scalding hot, isn't it? A. Yes sir. Q. It is so hot that if that pipe would brake in your place it would scald you to death? A. Yes sir. Q. It was running into the live steam of the boiler? A. Yes sir. Mr. Pettis: All right, *Good bye.*"

It is obvious that the sole proposition involved in this facetious leave-taking of the witness, was that

it would not be possible for frost to disable the braking and bell ringing devices. The proposition was wholly abandoned by defendant. It was conceded that frost, at eight o'clock on the morning in question, actually *disabled* the air-brake devices, and that the identical process of firing waste, saturated with oil, and applying it to the appliances disabled by frost, was actually employed. The witness's observation of the failure of the appliances *from frost*, is entirely consistent with his want of ability to explain the technical process by which the frost worked a failure of the braking and bell ringing appliances. Plaintiff called a locomotive engineer of long experience, who explained why frost causes failure of the air appliances; and, later the defendant produced corroborative testimony of the burning of oil saturated waste.

Charles E. Finch, a locomotive engineer of long experience, testified, in substance (pp. 266-270), as follows:

Exposure to the atmosphere of air cylinders and reservoirs in a high wind at a temperature of 15 degrees below zero, affects the free operation of air appliances. I have known air brakes and appliances to fail on account of cold. The air is pumped into the main reservoir with an air pump worked by steam. If there is moisture enough in the air it causes it to freeze, and many times there is moisture enough in it. There is a tendency in the process of compressing air to accumulate water in the reservoir; and water in the reservoir affects the operation of the device. It can do so by freezing; and the valves do not work as nice when the air is wet as when it is dry. When

the appliance is affected by freezing in the manner I have stated, you have to find out where it is frozen, and where the trouble is, and thaw it out if you can. To prevent accumulation of water and the freezing in excessively cold weather, the reservoir should be kept well drained, and the water and moisture kept out. That is what freezes. (p. 274) I have seen a bucketful or two of water turned out of an air reservoir.

Ernest Tramp, when previously in the service of defendant at North Platte, had experience in thawing out frozen air appliances with torches, and with steam and hot water applied from a hose (p. 253).

S. C. Wheeler, the air brake instructor of the Burlington railroad, called by defendant, on cross-examination made the following admissions (pp. 263-265):

The air braking appliances are exposed to the weather. The heat from the locomotive boiler is largely neutralized by a temperature of 15 degrees below zero, and a high wind. In such conditions, if water got into the pipes or valves, it would probably freeze. The formation of ice about a valve puts it out of use.

J. O. Mars, defendant's foreman of air brake equipment, testified on cross-examination, in part, as follows (pp. 377, 378):

"Q. This piston moves in a cylinder, doesn't it? A. Yes sir. Q. Suppose ice had gotten about it and frozen on it, on a cold day, in a driving wind, with a temperature of fifteen degrees below zero, so that it became necessary for the engineer, in order to make the brakes work, to get a supply of waste, and saturate it with engine oil, and put that on a scoop shovel and make a fire of it and thaw the ice off the piston, would you say that that condition would

indicate that that particular valve or piston was totally disqualified for work. A. Yes sir. Q. (By defendant's counsel) Could that condition of ice freezing on the end of the piston occur at any time during the time the engine was in use? A. No sir. I do not think it could, sir."

The last answer is pointless since the fact that a torch was actually used is definitely established by the concurring testimony of witnesses for both plaintiff and defendant.

Roscoe Zimmer, the engineer operating engine No. 213 in the yards, detailed the use of a torch to thaw the air brake as follows:

"(p. 297) A. When we went down and went to stop, I noticed that the brakes didn't take hold the woy they should. * * * A. We made two or three switches there, and then went back up on the track where we were standing, where we started from in the first place. And I set the air and got down to look the engine over to see what was the matter; and I discovered that *the brake pistons didn't work, or wasn't working,* on account of the ice that was froze on them. Q. Then what did you do A. Just left my brakes set and I went to the oil cellar and got some waste and some head light oil, and I put some waste on a scoop shovel and poured the oil on it and touched a match to it, and put it on the brake cylinders and stood there until the brakes applied. Q. What time was this, now, that you did this? A. I suppose this was right around eight o'clock in the morning."

It is submitted that the record in which are found the foregoing variant statements, raises a sharp issue of fact, on which the finding of the jury is conclusive upon the reviewing court.

The fireman of engine 213, *Matthews,* testified as previously quoted, that because of the failure of the power brake there was no means of stopping the engine, at the time of the casualty, except the use of the reverse lever. The following testimony of *Zimmer* shows that the reverse lever was actually used by him in making the stop on the occasion of the collision in question:

(p. 312) Q. What did you observe about the brakes taking hold at that time? A. I observed that the engine slowed down. Q. Then the next move was what? A. *I put the reverse lever in the forward motion.* Q. what does that do? A. It has a tendency to stop the engine a little quicker. * * * Q. Does it have a tendency to drive the engine the other way? A. When there is no steam working it doesn't; but it has a tendency to change the link motion. Q. You will have to tell me what the link motion is. I don't know anything about that? A. It is covered by the reverse lever and it has a tendency to stop it a little quicker by reversing the engine. Q. Did the engine stop? A. Yes, sir.

It is not material here that the engineer, *Zimmer,* ascribed a different motive for use of the reverse lever than the one of absolute necessity ascribed by his fireman, *Matthews.* It is enough that the actual operation was consistent with the testimony of Matthews, and that the conflict raised an issue upon which the finding of the jury is conclusive.

7. There were sufficient proofs to justify submission of the question of whether the failure of the engine power brake *contributed* to Fred Huxoll's injury and death.

There was no occasion, under the issues, to inquire what specific injuries were of a fatal character. In the answer it was "admitted that the deceased, Fred J. Huxoll, was at the time of the accident in question a locomotive engineer in the service of this answering defendant, and that on the 2nd day of January, 1911, *he died as a reuslt of such accident.*" (Printed record, p. 7.) Counsel for the Railroad Company, in his opening statement to the jury said: "That Mr. Huxoll was killed at Sidney, is not in dispute. That he was taken out from under an engine at Sidney, will not be in dispute. * * * That he was killed by being run over by an engine will not be in dispute." (Printed record p. 80.) Assuming that the power brake was not working, was there any evidence that this fact *contributed* to the injury or death of Fred Huxoll's.

Engineer, *Thomas Orton,* called to run the companion engine of the double header, *with Huxoll,* gave the following testimony which is in the printed record at pages 139 and 140:

"Q. Did you notice this place where Mr. Borton said there were some marks in the snow, indicating where it had struck him? A. I did not pay any attention to that. When I saw the man under the engine the main thing was to get him out. Q. Did you help get him out- A. Yes. Q. *How long were you getting him out?* A. *Forty-five minutes.* Q. What did you do there? A. I got under the engine. Had to take down brake-rods and hangers under the left driver. He was wedged under the brake-rods and hangers, under the left driver. (last sentence was stricken as not responsive.) Q. What were the injuries upon

him? A. Of course, we could not tell, only what was in sight, was the right arm; the left main driver was standing on it at about the cuff of his glove, and he had a scalp wound; and they afterwards found that the arm was torn out at the shoulder; but he was rolled up in a storm coat. * * * Q. Did you talk with him? A. I talked with him some, what was necessary about getting him out. Q. Was anything said by Huxoll about the accident. A. I don't remember what he said at the time. Q. Did he know who struck him? A. Afterwards. Q. Where was that? A. On the road to Cheyenne. Q. Did you go with him to Cheyenne? A. Yes, sir. Q. How long after the accident did this talk occur? A. About two hours after we got him out. * * * Q. He was hurried to Cheyenne, was he? A. Yes sir. Q. Were there some doctors with him? A. Dr. Mantor was with him. Q. What was it Fred said? A. He asked what engine it was that struck him, and I told him engine 213. Q. Did you see the condition of his wounds when they got him to Cheyenne and undressed him? A. Yes, sir.

Orton also testified (p. 139) that the distance between the water crane and the point where Huxoll was found had been measured and "it was just 72 feet."

Borton estimated that the west end of tender was 150 feet west of the water crane (p. 116) and that Huxoll's body was 75 feet west of the crane.

Charles E. Finch, a qualified locomotive engineer, testified that with the particular style of the engine 213, with its brakes perfect, dry track, cold weather, and a speed of 3 or 4 miles an hour, the engineer in making a stop " should not go over 8 or

10 feet, and very frequently we stop almost instantly, going at that rate of speed, with a heavy engine." (pp. 270, 271.)

(P. 301) *Zimmer* testified that the speed of the engine was " as near as I can tell about three miles an hour." And he testified to the same effect at page 310.

Zimmer, on cross-examination, questioned first concerning his testimony previously given by deposition, said (p. 315):

Q. I will ask you if you were asked this question by Mr. Hoagland at the taking of the deposition referred to: "How quick can you stop an engine going *six miles* an hour? and if you didn't answer: In good weather you can stop it in ten feet?" A. Yes sir. Q. Is that a fact? A. I think so. Yes sir- in good weather on a dry rail.

Zimmer testified by deposition (p. 324): Q. How far do you thing you went ofter the signal to stop, before you stopped? A. I don't think I went to exceed *forty feet.*

The following is shown in the cross-examination *of Zimmer* at page 325:

Q. I will ask you if on the occasion of the taking of your deposition, to which I have referred, you weren't asked this question: "When did you first notice anything wrong or heard anything wrong?" and to that question did you not answer as follows: "Riggs said, 'stop her' just like that. I do think he gave me a signal. If he did it was with one hand. He was looking back, and he said 'stop her' and I turned and put the air on and *reversed the engine.*" A. Yes, sir.

Dupont, the fireman whose grip was knocked from his hand, testified that he immediately got on the step of the moving engine and hollered for the engineer to stop. (p. 388.) The brief of plaintiff in error exhibits testimony of Matthews (p. 60), and the voluntary statement of Dupont (p. 65) presenting the theory that the steam was not shut off till Dupont had mounted the engine steps and hollered, and that stop signal did not originate from any jolting of the engine, but from the notice of the casualty given by Dupont.

The grip knocked out of *Dupont's* hand was found by *Riggs* immediately upon the engine's coming to a stop, "right in the center of the track, about three feet east of the pilot," (p. 436.) This demonstrates that after the collision the engine ran at least as far as the distance from the east end of the pilot to the wes end of the tender, plus the three feet between the hand grip and pilot. According to the estimate of Borton shown at page 116, this involved a movement of from 133 to 138 feet. The speed of *three* miles per hour, testified to by Zimmer, was only a moderate walk for a pedestrian, and, with an efficient power brake obviously admitted of an almost instantaneous stop. If there was a good power brake, there was no justification for running forty feet after getting a signal or warning requiring an emergency stop. The proposition is incontrovertably established by the concurring testimony of locomotive engineers called by both of the parties; and under any admissible theory there were proofs justifying that inference. and making it a question for the jury.

Other witnesses testified to the incident of the removal of the brake rigging of the main drivers, but the excerpts given are deemed sufficient. The record showing makes it obvious that no engine movement could safely be made for the purpose of releasing Huxoll and permitting his quick removal, because in the position in which he was found, wedged under th brake-rigging and driver, any engine movement would roll and crush him. Removal of the brake-rigging was the only practicable way to release the weight that was pressing upon him. Engineer *Zimmer*, in charge of engine 213, said (p. 310): "I got down out of the cab, and I started down and I met another engineer by the name of *Thomas Orton*; and he said, 'get back up into the engine, we want to move her; Mr. Huxoll is under the engine, and we want to move her.' And then I got back up and then he said, 'Don't move her. We will have to disconnect the brakes to get her (him) out.'"

It is apparent that Huxoll was not subjected to the weight of the brake-rigging and left driver, by which he was fettered during the *forty-five minutes* required to disconnect the brakes, until a point of time coincident, or practically coincident, with the bringing of the engine to a full stop. The judgment of *Orton*, that the situation would not admit of release by an engine movement was obviously accurate. As soon as Huxoll was subjected to the weight of th driver and the brake-rigging, a forward movement would roll him under and subject him to the crushing weight of the engine. His arm had just gone

so far under that the driver rested on it, and his body was "wedged" under the drive and brake-rigging when the engine came to a full stop; and in that position a forward movement of an additional foot would have produced instant death.

The situation, as clearly depicted by the proofs, shows it was the last five feet, or perhaps one foot, of the distance traversed by the engine in making a *slow stop,* that pulled Huxoll's arm out of its socket, and imprisoned him for 45 minutes under a ponderous load, while the brakes were being disconnected. If we assume that the power brake was not working, and the slow stop was an incident of its failure, it is then evident that the violation of a safety appliance regulation contributed to both the *injury* and *death* of Fred Huxoll. The issue is certainly presented by the proofs, and the finding of the jury is conclusive.

8. The proofs touching the course of conduct of Fred Huxoll at and prior to his death, made the issues of assumed risk and contributory negligence questions of fact for the exclusive determination of the jury.

The instinct of self-preservation is a consideration to be taken into account without proof, since the casualty proved fatal and no statement by the deceased of the circumstances of the casualty was ever obtained or obtainable.

The blue print plat of the Sidney yards, exhibit 2, shown at page 507, discloses that they are crossed by a public street called Rose street; and that the network of tracks from a point west of the round

houses to the spot track, where Huxoll was obliged to board his engine, was a veritable puzzle. The plat shows that there was no way which the engineer could pass from the wash house to the spot track without being subjected to the risks of crossing one or more tracks. It is not practicable to here reproduce the plat, and we therefore suggest that the court inspect the original. In the record is another plat, exhibit 4, page 608 (reproduced at page 2 of the brief of plaintiff in error), which omits many of the tracks and the permanent yard improvements, as well as Rose street crossing. But this exhibit shows, also, that it was necessary for Huxoll to cross at least one track west of the round house, and to chance a fall on the ice about the water crane, or make two or more track crossings east of the round house, in order to board his engine. A reference to the original exhibit will enable the court to resolve the dispute upon this fact.

Thomas Orton, the companion engineer, with Huxoll, when called for the particular service in question, and who went with Huxoll to the locker and wash house to prepare for the road, testified:

"(P. 136) A. I think a man could tell where he was going, up until the time he got down to my engine, *and from there on I don't know.* * * * (The testimony showed that Huxoll had traveled in safety past the limit of the point described in which he could tell "where he was going," as the engine of Orton is located by defendant on its exhibit 4, p. 608). Q. Now, with the engine which Huxoll was to go to at the location it was in, your engine being to the west, what would have been the usual course for him to

have taken to get to his engine? (p. 137). A. A man had practically a clear track, as near as I can remember, either to the north or south, to go to the engines, *with the exception, of course, of the water crane.* Q. Do you know what, if any, ice there was in the vicinity of the water crane that morning? A. I don't know how much ice there was around it. Of course, there was more or less water spilt from taking water out of this crane, and, of course, we had nice weather up until this time, and I do not know how much ice had accumulated around there. Q. Could a person have passed between the water crane and the main track, on the south, without getting into the ice? A. Well, if this place was froze over with ice, like they are sometimes in the yards, you would have to cross the ice (stricken on motion.) Q. Would Mr. Huxoll, in going from the wash house to his engine, at the place it was located, if he did not cross the main line, had to have crossed the track to the north of the water craine? A. He would have had to cross the spot track in order to get there, or cross— Q. Then if in the condition that things were in there that morning, if he had not crossed the spot track, on the north, he would have had to cross the main track on the south, or else have gone through the ice at the water crane? A. He would have had to have (gone) either that way, or cross some of the tracks."

W. A. Borton, yard master at Sidney, described the water crane (pp. 98, 99) as an upright iron pipe from 12 to 15 inches in diameter, and what is called a goose neck attached to the top, with a crook on the end, which is turned around and used for watering engines on both the main and spot tracks, between which it stands. It is surrounded by a platform, the east and west dimensions of which are 12 feet, and

the north and south, 8 feet, and which thus occupies practically all the clearance space between the engines and cars on these two tracks for the length of 12 feet.

W. A. Borton, at page 116 of the printed record, testified:

"A. About 15 feet west of the water crane I found marks in the snow, in the middle of the track, that indicated that he had been knocked down at that point, and as the engine proceeded westward it struck him."

It will aid an understanding of the significance of the last quoted evidence, to explain that plaintiff presented the theory that Huxoll had proceeded in a southeasterly direction, with his fireman Dupont, from the wash house and was between the main line and spot tracks, until just about the point where the engine 213 struck him; and that at that point he stepped on the main line track to detour around the water crane. Assuming that the indentation marks in the snow were only 15 feet from the stand pipe, and that the platform extended 6 feet west of the pipe, and that he was knocked backward by the force of the collision, and may even have taken a backward step in answer to the impulse of self-preservation, he must necessarily have proceeded eastward up to the very point of the stand pipe platform. Being then between the main line and the spot tracks, he faced the platform beside which stood the tender of Orton's engine then taking water, and around which was the perilous ice, while the water was dripping from the crane and freezing as it fell. To the north of him was Orton's engine. To

avoid Orton's engine, and the perils of the icy ground and platform around the stand pipe, he would naturally turn to the south, circling around the ice, a course which took him across the main line track, which appeared to be clear, and which had been assigned to him for the run upon which he was to start at once. In the circumstances he took *apparently* the safest course open to him, and the issues of assumed risk and contributory negligence cannot be resolved against him as matters of law. This is obviously true if the theory stated presents an admissable inference from all the evidence. We proceed then with the further incidents of the proofs, exhibiting first the showing on which defendant contends assumption of risk is established as a matter of law.

Paul J. Dupont, the fireman who accompanied Huxoll, testified in chief, (p. 380): That he left the wash house with Huxoll at about 11 o'clock, and proceeded south from the wash house to the main line, and he then walked east.

"A. I was walking on the *north* side of the track, and Mr. Huxoll was walking between the tracks, eastward, then. Q. Between the tracks? A. Right down the middle of the main line. And I was on the *south* side of the main line. * * * A. I continued eastward from the turn table there to the spot track. Q. This spot track over here? A. Yes sir. Q. But what relative position was Mr. Huxoll in with reference to you in walking down along there? A. He was walking behind me about 10 or 12 feet, and on the right hand side of me. I was on the north side of the main line, and he was in the middle of the main line, behind me, about 10 or 12 feet. (p. 381) Q. Were you carrying anything in your hands? A. Yes sir, I

was carrying a grip. Q. Did you see your engine, or engines, standing down there by the water crane? A. No sir. Q. As you went east did you hear anything? A. Yes sir. Q. What did you hear? A. I heard a noise that sounded like an engine coming from some direction. *I did not know just where*—whether it was coming from the east or west, or where it was coming from. Q. What kind of a noise? A. The rumbling noise of an engine. * * * A. When I heard it coming I notified Mr. Huxoll that I heard someone coming and warned him to get out of the track as soon as I heard it. * * * A. I was west of this engine on the spot track * * * Q. Now, did you hear anything further of this rumbling? A. I heard a noise and I also heard the bell ringing. * * * A. It was right at the time I notified Mr. Huxoll. * * * A. *The next thing that happened* after I heard that noise, this engine came by and knocked my grip out of my hand. * * * A. Right hand. And I at once turned around to see if Mr. Huxoll got out of the track; and at that instant I saw this engine 213 knock him down. Q. Where was he at that time? A. Between the tracks. Q. Where was you as regards this engine on the spot track? A. West of it. Q. Where was you going? A. Down to that engine on the spot track *where we always go* to see whether it was there or not."

It will be noticed that there is a conflict between Dupont and Borton as to whether the point of the casualty was west of the engine on the spot track, and that the incident by which Borton located the point of contact of Huxoll's body with the snow is altogether persuasive. We shall now show that Dupont was so strongly impeached that the jury was justified in finding against the veracity of his statements.

On the 4th of January, 1911, three days after the accident, this same Mr. Dupont told Huxoll's uncle, *Ernest Tramp,* in answer to an inquiry as to how it happened, that he was not hurt when he and Huxoll were together: "Well, Mr. Tramp, I don't know. There was such a storm you could not see your hand before you face." He then told Mr. Tramp that he, himself, had been knocked down by the engine. He claimed then to have said: "Fred, look out, I hear something, but at *the same time,* I was struck and knocked down, and when I gathered up my grip, Fred was run over." (p. 456.)

On the 3rd of January, 1911, he stated to Fred Huxoll's widow: "I yelled to Fred, I heard something. *Just then* I was knocked down" (p. 455).

It was shown on cross-examination (p. 390) that at Kansas City, Missouri, on July 12, 1912, in the presence of Month J. Pruitt, the witness, *Paul J. Dupont,* made a written, signed statement of the particulars of the casualty in question wherein he detailed the course taken from the wash house by himself and Huxoll as follows (p. 392):

"Just a few minutes prior to this accident, the deceased, Fred Huxoll, and myself started from the wash room, a small building about fifteen or twenty yards west of the above mentioned round house, *and started out in a southeasterly direction,* passing alongside the turntable at the round house, and *continuing in a southeasterly direction* toward our engine which stood, facing east on the outbound track about ten yards east of the aforesaid water crane. This outbound track extending from the water crane to its eastern extremity was parallel with the main line

track running east and west; but this outbound track, extending west from the water crane, diverged to the notrhwest, to the northwest extremity of the turntable. *The deceased and myself continued in this southeasterly direction until we neared the main track at a point about ten yards west of the above mentioned water crane.*"

His very precise voluntary statement, contradictory of Dupont's oral testimony, is certainly consistent with the theory of plaintiff that Huxoll had proceeded across the yards, avoiding points of danger, till he had approached the spot where he might expect his engine. According to defendant's own plat, exhibit 4, the west end of Orton's engine, the tender of which was opposite the stand pipe and crane, must have been more than ten yards west of the crane. Orton, as we have seen, placed Huxoll much closer to the crane, and practically up to the platform of the crane. There was Huxoll; the obstruction of the stand pipe and its platform, surrounded by the perilous ice, immediately in front, and Orton's engine on the left. He followed the instinct of self-preservation, and turned for safety across the main line which both he and Dupont thought was clear. But in his previous statement, *Dupont* further said (p. 392):

"At this point, with Fred Huxoll about ten feet behind me, we began walking in an easterly direction toward our engine, and *parallel with the main line track.*"

A radical departure from these voluntary, specific statements previously made, upon a fact so vital, to the issues, at least made the credibility of the oral testimony of Dupont an issue for the determination

of the jury. It is preposterous to urge that a reviewing court should resolve that issue against plaintiff as a matter of law.

The following are excerpts taken from Dupont's cross-examination:

"(P. 383) Q. As a matter of fact your collision with the engine tender came within an instant after you spoke to Huxoll, didn't it? A. Yes sir. Q. And when you looked to see Huxoll, you found him endeavoring or trying to get out from between the tracks in answer to your warning? A. Yes sir. * * * (p. 656) Q. And you didn't feel that you were in any hazard at all when the engine hit your grip? A. I felt I was, yes sir. Q. Well, would you have deliverately allowed the engine to hit your grip, if you had had time to get out of the way? A. *Not if I had seen them coming, I would not.* Q. Then, the fact is that you, yourself, were surprised or you would not have collided with the engine tender? A. *Certainly I was surprised.* * * * (p. 384) Q. Then isn't it a fact that in an instant after you spoke the tender struck your grip in your hand? A. Well, it wasn't a great while after I spoke. Q. Just answer directly, whether or not it was? A. *It was just an instant, yes sir.* * * * (p. 387) Q. By the time you got squared around you could not see the track at the leading end of the engine—if you were that close to it—by the time you got yourself squared around? A. Which end do you call the leading end? A. The end that struck you? A. I could not see that after I turned around. Q. Now you were meeting that engine? A. Yes sir. Q. And didn't see it until it struck you? A. No sir. Q. How do you explain the fact that you didn't see it, when you were facing it, and walking towards it? A. I wasn't looking for it. Q. Was there any other reason? A. There was a bad wind and storm

there that I wasn't able to see. Q. And, also, your attention had been drawn to it so that you had hollered to Fred? Hadn't you? A. Yes sir. Q. Well, after your attention had been drawn to it, would you not be looking for it yourself, if you tried to give Fred warning? A. Well, I looked for it; but I was in the clear myself, or thought I was. Q. Well, you didn't know where it was? A. No sir. Q. Well, you didn't think you were running with your nose into the tender, or with your grip exposed, out where it might be knocked out of your hand, when you were hollering to Fred? A. No sir. * * * (p. 388) Q. Was that the usual way you went to reach the engine on the spot track? A. No sir, not always. Q. Was that the usual way, I asked you? A. *It was the usual course, I took, yes sir.*"

At page 388 Dupont testified that the first thing he did after the collision was to mount the step of the engine and call to *Zimmer* to stop. Then follow these questions:

"Q. When you boarded the engine, you didn't hear any bell ringing did you? A. No sir. Q. Or you would not say, now, that the bell on engine 213 was ringing, would you? A. I do not know that it was, but I do not know that it was not. I know I heard a bell, but I do not know whether or not it was on 213, or 219, of some other engine."

The cross-examination developed that Dupont's deposition was taken at the Union Pacific office building, in Omaha, February 26, 1913, when, he certainly confessed some of his answers were more favorable to plaintiff than his oral testimony.

The testimony must be considered in connection with the admitted facts that the Company sent a call to Huxoll and gave him running orders requiring him

to go at that particular time, in close proximity to the point of the casualty. He was on the business of his master at the time and place of the fatal casualty. The issue of assumed risk cannot, therefore, be resolved against him, as a matter of law.

9. A claim was made by counsel at the trial that the defendant furnished a fine *Sherman Hill gravel path from* the wash house to the spot track for the use of its engineers, and defendant's witnesses were quite generally examined on the question of this excellent *foot path.* Testimony was also elicited to the effect that it was usual for enginemen to go over a different course from the wash house to the spot track than the course ascribed to Huxoll in the oral testimony of Dupont, although Dupont testified they were pursuing the usual course which he took. No effort was made to criticise the course which Dupont, in his previous written statement ascribed to Huxoll. The following characteristic cross-examination of *James C. Clark,* defendant's engine inspector at Sidney, indicates the value of the showing on these subjects:

"(P. 571) Q. There is no special path made there, is there, *any different from any other place in the yard?* A. *No sir.* Q. There is nothing there to distinguish the particular class of ground or path there from what there is *all over the yards,* is there? A. *No sir.* Q. Now, as a matter of fact, you have seen engineers and firemen come from that wash house and take different routes? A. Yes sir. * * * Q. Did you ever see any bulletin containing any directions as to what course the engineers and firemen

should take when they left the wash house, to go to the spot track? A. No sir. Q. You didn't know of any such bulletin? A. No sir. Q. You didn't know of any regulation on that subject? A. No sir."

The only significance in the mention of Sherman Hill graval is, that it is the ballast of decomposed granite found at Sherman Hill and used on the Union Pacific main line and station grounds from Omaha to Ogden.

Asa T. Couch, a locomotive fireman, gave the following testimony on cross-examination (pp. 355, 356):

"Q. Did you ever see any bulletin posted up in those yards to inform the enginemen what course they should take in going from the wash house to the spot track? A. No sir. Q. Were there any placards posted up on places in the yards, saying, 'This course for the engineers to go from the wash house to the spot track?' A. I don't think there was. Q. Can you tell me who, if any officer of this company, ever promulgated any orders up in the yards on that subject? A. No. I don't remember. Q. You don't remember of ever seeing any such orders? A. No sir, I never did see a bulletin board. Q. * * * Was there any snow there on the morning of January 1st, 1911, when you quit work there, Mr. Couch? A. Yes sir, there was some. Q. Was there any wind blowing at that time? A. Yes sir. Q. What was the temperature? A. About ten or fifteen degrees below zero. Q. As a matter of fact, the enginemen were left to pursue their own course when they left the wash house? A. Yes sir. Q. And some times an engine would be on the *west* spot track, and some times on the *east* spot track? A. Yes sir. Q. And you have seen them go different directions, haven't you? Different men going different ways? A. I believe I have. Yes sir. * * * Q. Do you know a

track in the yards that enginemen and people don't walk across and on? A. No sir."

The claim that defendant furnished *a gravel path* to afford a safe passage for its engine and train crews in the Sidney yards between the washhouse and the spot track is such an obvious pretense and dissemblement, on the face of the entire showing, embracing the cross-examination just cited, that it becomes grotesque. *The same sort of gravel covers its whole yard,* and if the presence of gravel on the surface constitutes a path and an invitation to walk upon it, *the course actually pursued was a gravel foot path* on which Huxoll was invited to walk in choosing a course from the wash house to the spot track. The cross-examinations cited leave no doubt or uncertainty of the accuracy of this proposition. We see no process by which such pretenses may be profitably employed.

In concluding the presentation of the evidence, we do not lay any claim to having referred in detail to all of the evidence supporting the conclusions maintained. The voluminous record would make the brief needlessly voluminous if reference were made to every item of evidence bearing upon the propositions presented. It is sufficient for our purpose to show that the record proofs tendered issues upon the ultimate facts of negligence which required their submission to the jury; and to show that the presentation of the evidence contained in the brief of plaintiff in error does not develop the propositions raised by the record, that are maintained and relied upon by

the defendant in error. The significance of the record proofs, referred to in the above review of the evidence, cannot be obscured by any mere art or refinement employed in the review and presentation of the case. In the light of the evidence referred to, we shall now present a further legal argument and an answer to the propositions maintained by the brief of plaintiff in error.

III.

The State Supreme Court was unanimous in holding that the proofs were sufficient to require submission of the issues of negligence to the jury. This court has repeatedly announced that it will not disturb a unanimous decision on the sufficiency of the evidence "unless error is palpable."

"The case, then, is one in which there is no question as to the interpretation of any provision of the federal act, or as to the definition of legal principle in its application, but simply involves an application of all the facts and admissible inferences in the particular case, for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision *upon a question of this sort unless error is palpable.* The present case is not of this exceptional charcter, and we confine ourselves to an annoncement of our conclusion." Per Mr. Justice HUGHES, in *Great Northern Co. v. Knapp,* 240 U. S. 464, 466.

"The defendant (plaintiff in error) requested a peremptory instruction in its favor, on the ground that there was not sufficient evidence to entitle the plaintiff to recover. The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No *clear and palpable error* is shown which would justify us in disturbing that ruling." Per Mr. Justice BRANDEIS, in *Baltimore & O. R. Co. v. Whiteacre,* 242 U. S. 169.

The same doctrine was reiterated in practically the identical words, in an opinion by Mr. Justice BRANDEIS, in *Seaboard A. L. Ry v. Lorick,* 37 Sup. Ct. Rep. 440.

The theory upon which plaintiff in error is obliged to present its cause to this court is stated at page 17 of its brief as follows:

"We will concede for the purposes of the arguments that the bell was not rung; that the whistle was not blown; that there was no one riding on the foot board of the engine; that no one was sent on foot ahead of it, and that the brakes were out of order."

The brief, at page 72, also makes the following unqualified admission and declarations:

"It was admitted, at the trial, that the defendant did not have a switchman at the leading end of the engine," etc.

"The failure to send a flagman ahead of the engine was also admitted," etc.

It is submitted, upon the record references contained in chapter II. of this brief, and the concessions quoted from the brief of plaintiff in error, that it must require a critical and refined analysis of the evidence to discover even a plausible ground for contending that there is a deficiency of proofs upon any issue that went to the jury. Certainly the foregoing exhibition of the evidence discloses no "clear and palpable error" in that behalf, and the rule established by the cases cited leads to an affirmance of the judgment.

IV.

The purpose of the acts of Congress in question was to grant additional rights to the servants and to abolish existing defenses by the masters in actions by injured employes against railway companies.

In cases of concurring negligence recovery may not be denied by the mere art of ascribing the "proximate cause" to a particular, negligent act of the servant.

To satisfy the terms of the statute it is sufficient to prove that injury or death resulted "in part" from the negligence of the employer; and to satisfy the conditions eliminating the defenses of contributory negligence and assumption of risk, it is sufficient to prove that violation of a safety appliance regulation "contributed" to the servant's injury or death.

The Employers' Liability Act of April 22, 1908, imposes a liability on the master for injury or death of the servant "resulting in whole, *or in part,* from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (8 U. S. Com. St. An. § 8657.)

Section 3 of the same act closes with the following proviso:

"Provided that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes *contributed* to the injury or death of such employe." (8 U. S. Com. St. An. § 8659.

Section 4 of the same act is as follows:

"In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." (8 U. S. Com. St. An. Sec. 8660.)

Section 3 of the act referred to enacts specifically "the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

An apt expression of the motive and intent of Congress in passing the acts in question was made by Judge THOMAS C. MUNGER, in *Hulac v. Chicago & N. W. R. Co.* 194 Fed. 749, as follows:

"Congress has recognized by the Employers' Liability Act, as well as by the Safety Appliances Act, that these rules of law should be made more favorable to the injured servant. The purpose of Congress in the enactment of the Employers' Liability Act was the granting of additional rights to the servants and the removal of existing defenses by the master in actions by injured employes against railway companies."

In *Winfree v. Northern P. R. Co.*, 227 U. S. 296-302, in the opinion by Mr. Justice MCKENNA, holding that the Employers' Liability Act is not retroactive, it is said:

"It is the operation of the statute which determines its character. The court of appeals aptly char-

acterized it, and we may quote from its opinion: 'It is a statute which permits recovery in cases where recovery could not be had before, and takes away from the defendant defenses which formerly were available—defenses which, in this instance, existed at the time when the contract of service was entered into and at the time when the accident occurred.' "

In *Grand Trunk W. R. Co. v. Lindsay,* 233 U. S. 42, this court in an opinion by MR. CHIEF JUSTICE, quoted approvingly and adopted the following interpretation of the Employers' Liability Act found in the *per Curiam* opinion of the Circuit Court of Appeals, Seventh Circuit, in the same case, 201 Fed. 844.

"If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause —when defendant's act is no part of the causation— that defendant is free from liability under the act."

In *Louisville R. Co. v. Wene.* (C. C. A. 7 C.), 202 Fed. 887, the suit was for damages for the death of a freight conductor. The report shows deceased had placed the train in his charge on a switch to permit passage on the main line of another train, but had neglected to close the main line switch, for the closing of which he was held responsible by the operating rules. The special train turned off the main line at

the open switch to the track where the train of deceased was standing, the resulting collision inflicting fatal injuries upon the deceased. The switch target indicated an open switch and was in view of the engineer for a sufficient distance to have permitted a stop before the collision. The negligence of the engineer was his failure to keep a lookout by which he would have seen from the position of the switch target that the switch was open. Error was assigned to the refusal of the trial judge to instruct that leaving the switch open was the proximate cause of the injury and that deceased being responsible therefor, no recovery could be had. A judgment in favor of plaintiff was affirmed by the Circuit Court of Appeals of the Seventh Circuit upon a reference to the language of the opinion in *Grand Trunk W. R. Co. v. Lindsay,* 201 Fed 836, that was quoted approvingly by this court in the case previously cited, the court adding that the construction placed upon the Employers' Liability Act in the trial court "accords with the remedial spirit of the act."

The Circuit Court of Appeals of the Ninth Circuit in *Spokane & I. E. R. Co. v. Campbell,* 217 Fed. 524, quoted approvingly the interpretation of the Employers' Liability Act above mentioned, from the opinion in *Grand Trunk W. R. Co. v. Lindsay,* in affirming a judgment in favor of a motorman upon a special verdict finding that the plaintiff had left the station in violation of a written train order and that this act of negligence was the *proximate cause* of his injury in a head-on collision between stations. There

was proof, however, that the motorman might have brought his own car to a stop before the collision, had he been provided with an efficient power brake. He applied the Westinghouse airbrake, which first took hold, and then leaked off. The last cited judgment was reviewed and affirmed in this court in *Spokane & I. E. R. Co. v. Campbell,* 241 U. S. 497. In the opinion by Mr. Justice PITNEY in that case, it is said:

"Upon the whole case, we have no difficulty in sustaining his right of action under the Employers' Liability act. That act (§ 1, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657) imposes a liability for injury to an employee 'resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, * * * or other equipment.' As was held in *San Antonio & A. Pass. R. Co. v. Wagner,* decided June 5, 1916, 241 U. S. 476, a violation of the safety appliance act is 'negligence' within the meaning of the liability act. And by the proviso to § 3 of the latter act, no employee injured or killed shall be held to have been guilty of contributory negligence in any case where a violation of the safety appliance act '*contributed* to the injury or death of such employee.' It is too plain for argument that under this legislation the violation of the safety appliance act need not be the sole efficient cause, in order that an action may lie. The circuit court of appeals (133 C. C. A. 370, 217 Fed. 524) held that the element of proximate cause is eliminated where concurring acts of the employer and employee contribute to the injury or death of the employee. We agree with this, except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's viola-

tion of a provision of the safety appliance act are concurring proximate causes, it is plain that the employers' liability act requires the former to be disregarded."

It was said by the Circuit Court of Appeals, Sixth Circuit, in *Pennsylvania Co. v. Cole*, 214 Fed. 951, that

"Under this act no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery."

The same court, in *New York C. & St. L. R. Co. v. Niebel*, 214 Fed. 955, derived from the decisions of this court in *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, and *Grand Trunk W. R. Co. v. Lindsay*, 233 U. S. 42, that this court's interpretation of the Employers' Liability Act means:

"That defendant is liable if through other employees it is guilty of any causative negligence, no matter how slight in comparison to that of plaintiff."

It seems to be well settled, by the express terms of the acts in question, and by the judicial interpretations cited, that the case rightly went to the jury, if it is an admissable inference from the testimony that any negligent act of any of the defendant's servants had any part in the causation of the injury or death of Fred Huxoll. The discussions found in the brief of plaintiff in error, concerning what act or acts were the *proximate cause* of the injury or death, are inappropriate and inapplicable. The refinements of the common law concerning the dominant, or sole, or efficient or proximate cause of injury, without which it would not have occured, are abolished by the explicit and apt terms of the statutes. The statute

makes this the decisive inquiry: Did *any negligent act* of defendant *have any part* in causing the injury or death?

V.

The proofs presented an issue of negligence, based on the failure of the switching and engine crews to employ practical and known methods of keeping engine No. 213 "under control," and in failing to ememploy practical and known methods of making its presence and movement sensible to employes who by the extraordinary conditions were deprived of the protection of the senses of sight and hearing.

Moving blindly through the darkness and storm at a point where numerous employes were required to go to reach the double-header, was a proceeding of inherent danger.

Employment of a lookout on the leading end, a flagman to walk ahead, a slow movement, and ringing the bell, were available and known methods, in practical railroad operation, of averting the inherent dangers of a blind movement, and whether ordinary prudence made it necessary to use such precautions, was a question for the jury.

Pages 28 to 33, brief of plaintiff in error, present the contention that it is the prerogative of the Union Pacific Railway to assign a locomotive engineer to a duty which leads him into a strange yard, a hundred miles from his home, in conditions which deprive him of the protection of his senses of sight and hearing, and leave him to his fate, and that it owes him no duty to avoid methods of inherent danger in engine movements about him, nor to use known and practical means of warning to supply, in some measure, the loss of the protection of those senses.

It is maintained, in effect, that although the master has placed the servant in a situation which deprives him of the means of self-preservation, it owes him no protection, no warning, and no care to avoid his being run over and killed by an engine movement which he can neither see nor hear. This sensitive aspect of the contention is not openly asserted, but that is the end to which the argument leads, in the admitted operating conditions. In concluding the point council present the following summary and recapitulation of the argument (Brief Plaintiff in Error, pp. 33, 34):

"Assuming for the sake of argument that there was sufficient evidence in support of the allegation that the bell was not rung to warrant the court in submitting this question to the jury and that its verdict conclusively settles the question against the plaintiff in error, still the defendant in error was not entitled to recover on this ground because there is no evidence to show *that it was negligence as to Mr. Huxoll* to fail to ring the bell at the time and place in question. This is also our position in regard to the allegations that the *brakes* were out of order and that there was no *lookout* either on the engine or *preceding it.*"

The insistence that failure to ring the bell, and moving the engine without the benefit of any bell-ringing device, are not negligence "as to Mr. Huxoll," is the direct *antithesis* of the attitude maintained by defendant in the trial court. With a daring and boldness that challenge admiration for its courage, defendant elicited testimony *from its own witnesses* to show the failure to ring the bell and the moving of

the engine with its bell-ringer disabled, would, in the circumstances shown, be so hazardous and preposterous as to be unbelievable. From the record we cite one incident in defendant's examination of its own witness, *Meriam W. Riggs,* (pp. 437, 438) as follows:

"Q. If the bell had not been ringing, and could not be rung, for any cause, would you have operated that switch engine in the switch yards. Mr. Rose: The plaintiff objects to that question as immaterial and incompetent, and as self serving. Sustained. Exception. Mr. Strode: The defendant offers to prove by the witness that if the bell had not been ringing, for any cause, engine 213 would not have been operated in the switch yards. Mr. Rose: I am not going to object to that offer, or to the proof tendered, if the witness wants to say so. Mr. Strode: Read the last question. Q. (Last question read as follows): If the bell had not been ringing, and could not be rung, for any cause, would you have operated that switch engine in the switch yards? Mr. Rose: No objection to that question. A. No, I do not presume the engineer would use the engine, if the bell was not ringing."

To make sure of understanding the theory of counsel on the issue concerning the disabled bell-ringing device and the failure to ring the bell, plaintiff persued the inquiry on cross-examination, with the following result (pp. 440, 441):

"Q. And you would not go around knowingly and follow an engine in the yard that didn't have the bell apparatus in working order, either, would you? A. No sir. Q. Or at least have a bell rope that you could move the bell with, you think that is right, do you? A. I don't move the bell. Q. Well, you would not *follow* an engine if you knew the apparatus

for ringing the bell wasn't in commission, would you? A. No. Q. And I ask you if you would *follow* an engine in that condition as a switchman, would you knowingly follow the engine? A. No sir. Q. *It would be dangerous to do that, would it?* A. *It would.* Q. What function would the bell perform that you as a switchman would be concerned in? A. The bell, they are supposed to be on all engines, to be ringing, at most times, most generally, *when there was a storm in the yard.* Q. What is it rang for, to give warning? A. *Yes sir, to go to some place where we can't be seen.*"

Thus, defendant threw to the winds any right to contend that *Huxoll* was not entitled to the benefit of the bell, in its effort to outdo the plaintiff in showing such apparent necessity for the ringing of the bell in going where the engine could not be seen, as to argue to the jury that the very *wantonness* of the proceeding indicated its improbability. The sole issue, under the proofs touching this phase of the case was as to whether the bell was in fact rung. There was no issue as to defendant's duty to ring the bell for the protection of all persons, including Huxoll, whose safety might be imperiled by operating conditions that prevented them from seeing or observing the engine movement.

Defendant, by No. 28 of its requested instructions (pp. 33, 34) requested the submission to the jury of the specific issues concerning the ringing of the bell, and the substance of that request was included in the charge of the court in the court's instruction No. 20 (p. 48.) In disposing of the issue the trial judge flatly adopted the theory and contention made, in the trial court, by the defendant.

Returning to the general proposition stated in the head notes, we challenge attention to the circumstance that the defendant's employes testified they were running *blindly,* without any means of knowing whether they would run into anything. *Zimmer,* the engineer, testified: "Q. But you could not see what you were running into? A. No sir. *I did not know.*" *Riggs,* the only switchman with the engine, who rode on the step between the engine and tender, testified: "Q. So, as you were operating then, the only way you could tell of the presence of any obstruction on the track, *was when you came against it?* A. *It is true.*"

To escape inferences of negligence, plaintiff's error must justify *blind movements,* in a division yard, in extraordinary and perilous conditions, at a time when it had ordered two engine crews and a train crew to the immediate place in the yards where the blind movement was being effected, and must justify the omissions of every known precaution in engine and train movements, available to avoid accidents in the operating conditions shown. The proceeding was one of *inherent danger.*

The Sidney yard is on the Union Pacific main line. The volume of the traffic on the main line of this double-tracked, transcontinental highway of interstate commerce, is so great as to make every division yard a place of incessant and ceaseless activity. The conditions of exceptional peril were affirmed by both parties. It may be conceded that employes, in crossing the tracks in this yard in obedience to or-

ders, should look out for approaching and passing engines and trains. But how may they keep a lookout? The obvious answer is: Only by the use of the senses of sight and hearing. The duty of employing those senses for their own protection implies opportunities of seeing and hearing the approaching train. Should a train be permitted to move where it is known employes are assembling in the performance of duty, in conditions which prevent them from seeing the train's approach, without the aid of an artificial light, with no lookout at the leading end, no lantern, no flagman walking ahead on the ground, and without the warning sound of a bell or whistle? We have yet to see the judicial holding that an employe may not even have the protection of his sense of sight in a position of peril. The imposition of the duty of watchfulness necessarily presupposes the opportunity to see and to realize the presence of danger. The sunlight ordinarily discloses the moving engine in day time. At night the glaring headlight ordinarily reveals the track for half a mile ahead of its actual approach. The normal man could not, consciously, stay in front of the engine if he would. The impulse of self-preservation would weaken his courage, and make him shrink and recoil from pending disaster, and spring and leap, irressistibly, to some apparent place of safety. But how would the instinct of self-preservation receive any impulse if the employe were blindfolded and there were no warning sounds of the engine's approach? It is true, there would still be left the sense of *touch*, by which the actual impact

could be *felt;* and according to the accredited witnesses of defendant, that was the sole means of discovering anything on the track when *Huxoll* met with his fatal hurts; and that was the sole means by which Huxoll could discover his position of peril. At that point of time he was already entrapped.

The unusual conditions of danger demanded corresponding precautions, and no precedent is cited for withdrawing from the jury the function of determining what constitutes reasonable prudence, in the conditions and circumstances shown in the case under review. Certainly the extreme perils indicated by the darkness and the blizzard do not suggest dispensing with any available, practical and known expedients for avoiding casualties, under the particular operating conditions in question. The rules requiring night signals in stormy and foggy weather, when day signals are obscured, requiring a lookout on the leading end and a flagman on the ground, in special conditions, indicated methods of operation known to every employe in the operating department, that were practicable and available, in the yard, in the particular engine movement causing the fatality. Such rules were offered and read in evidence to the jury. Witnesses detailed and explained the practical operations contemplated by the rules. The operating conditions were also in evidence. Ordinary prudence was the standard of care required by defendant, *as applied to the particular operating conditions shown.* The law is, that upon such proofs the jury has the function of determining whether de-

fendant exercised ordinary prudence. In determining that issue the jury is not limited to a consideration of the specific rules or customs promulgated or followed by defendant and its servants, in ordinary conditions, in the Sidney yards. If the proofs show that ordinary prudence required something more, that conclusion could be drawn by the jury in spite of contrary rules and customs. That rule is definitely established by well considered judgments of this court.

In *Grand Trunk R. Co. v. Ives,* 144 U. S. 408-434, it was said in the opinion:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from

them, that the question of negligence is ever considered as one of law for the court."

The case in which the last quoted language is employed involved liability for an accident at a railroad crossing. Police regulations had been enacted on the general subject of safeguarding such crossings, which required no switchman at the crossing in question, and it was contended that these regulations were exclusive. In concluding an exposition of the question denying the merit of the contention, the court said:

"The underlying principle in all cases of this kind which requires a railroad company not only to comply with all statutory requirements in the matter of signals, flagmen, and other warnings of danger at public crossings, but many times to do much more than is required by positive enactment, is that neither the Legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company, at a crossing, in every particular case which may afterwards arise. For, as already stated, each case must stand upon its own merits and be decided upon its own facts and circumstances; and these are the features which make the question of negligence primarily one for the jury to determine under proper instructions from the court."

Texas & P. R. Co. v. Behymer, 189 U. S. 468-471, involved a charge of negligence by the servant, that his master had neglected to exercise ordinary prudence for his safety in a situation of peril, the servant's known position being upon the top of an ice-covered car when the train was subjected to a rough stop. In the opinion by Mr. Justice Holmes, it is said:

"The fundamental error alleged in the exceptions to the charge is that the court declined to rule that the chance of such an accident as happened was one of the risks that the plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and ordinary way. Instead of that, the court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done. But what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. *Wabash R. Co. v. McDaniels,* 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932. No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet, it can be avoided, if necessary, and when the particular and known condition of the train makes a sudden bump, obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as the train did stop, the risk of it was not assumed by the plaintiff. *Texas & P. R. Co. v. Archibald,* 170 U. S. 665, 672, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777."

It is submitted that the language quoted is an application by this court of the rule invoked by defendant in error to an alleged perilous situation of the servant that was neither so obvious nor so aggravated as the operating conditions encountered by *Huxoll.* It was left to the jury to determine upon the facts in evidence whether ordinary prudence on the

part of the master would permit a rough stop when a brakeman was known to be on the icy roof of one of the cars. Ordinary practices were held not necessarily applicable to unusual operating conditions.

In *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 461, it was said in the opinion by the late Mr. Justice HARLAN:

"And to say, as a matter of law, that a railroad corporation discharged its obligation to an employe —in respect of the fitness of co-employes whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law."

In *Fletcher v. Baltimore & P. R. Co.*, 168 U. S. 135, 142, Mr. Justice PECKHAM, in the opinion, said:

"The fact that this custom had existed for some time without any injuries having been received by anyone is not a legal bar to the liability. It may be addressed to the jury as an argument upon the question whether the act was in its nature dangerous, and whether under all the circumstances the company was guilty of any negligence in permitting its continuance; but if the character of the act com-

plained of is such that a jury might upon the evidence fairly say that injury to others might reasonably be apprehended, the fact that none such had therefore occurred is not an answer, as matter of law, to the charge of negligence in continuously permitting acts of that nature. As against the contention that this act was not in its nature dangerous it might be urged to the jury that the caution given to be careful showed that there might be danger in the performance of the act itself. It would be for the jury to answer the question."

The concluding words of the last quotation apply aptly to the proofs in the present case. The yardmaster testified to a distinct recollection of warning the yardmen to be careful to move cautiously at points where the tracks were obscured by smoke and steam and not get into anything. The caution to use extra care implied that engine movements at the particular location to which the warning applied were perilous and proved the knowledge of the yardmaster of the extraordinary risks.

The Circuit Courts of Appeals, upon reference to judgments of this court, have held that where all surrounding conditions were shown, it is for the jury to determine whether the standard of reasonable care has been complied with. Whether an unreasonable rate of speed, failure to ring the bell, keep a lookout, or to employ a flagman, are negligence, depends, not upon the operating rules and customs of the railroad company, but upon a consideration of whether existing conditions require the observance of such precautions.

In *Chicago, St. P., M. & O. R. Co. v. Nelson,* 226 Fed. 708, 711, 712, it was said in the opinion of the Circuit Court of Appeals, Eighth Circuit, as follows:

"Evidence that a railway company backed a train of five cars over a place where it was known laborers were engaged in work, without any precautions to warn them of the approach of the train whereby the injury could have been prevented, is clearly sufficient to require the submission to the jury whether the railway company exercised due care for the safety of men working at that place, when, as was conceded by counsel for the defendant at the trial, the decedent was not a trespasser, but was rightly there. *Grand Trunk Railway Co. v. Ives,* 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Chicago & Erie R. R. Co. v. Shaw,* 116 Fed. 621 54 C. C. A. 77. The facts clearly were of such a nature that all reasonable men would not draw the same conclusion from them, especially that there was no negligence. * * *

"The submission to the jury of the question whether the bell was ringing when the train was backing was clearly proper. The workmen engaged in the construction of the sewer, and who were within a few feet of the decedent, all testified that they did not hear any bell. The fireman on the locomotive testified that he gave the cord one pull when the train started and that it tapped. The engineer testified that it was tapped, but neither he nor the fireman testified that it was ringing while the train was backing. Besides, considering the distance of the locomotive from the place where the decedent was standing, being five car lengths from the end of the train, the noise in a railroad yard having about twenty switching tracks, and where the switching of many trains was being conducted, it would hardly be a sufficient warning under the circumstances, especially if, as claimed on behalf of the defendant, the

train was only from three to six feet from the place where the decedent was at work.

"The court properly submitted to the jury the question whether the defendant was guilty of negligence in not keeping a lookout on the rear of the train, knowing that men were at work on its tracks. The fact that it was not the custom of the defendant when backing its trains to have a rear brakeman does not relieve it of responsibility for an injury caused by reason of such omission. There is nothing to show that the decedent knew of this custom. Besides, custom cannot excuse negligence, and will not relieve from liability, if the injury would not have occurred, had due diligence been exercised. *Parker v. Cushman,* 195 Fed. 715, 117, C. C. A. 71; *American Car & Foundry Co. v. Uss,* 211 Fed. 862, 868, 128 C. C. A. 240, 426. Had there been a brakeman on the rear end of the train to warn the decedent or the engineer in charge of the locomotive, the accident could not have occurred."

Delaware L. & W. R. Co. v. Caboni, (C. C. A. 2 C.) 223 Fed. 631, 633, was an action for the death of a track laborer who was fatally injured on being struck by a work train. In the opinion of the court it was said:

"As to the second conclusion we think that reasonable prudence required the stationing of some one to look out for the approach of trains and to warn the workmen when such approach was seen. The men were in a position where, some of them at least, could not see an approaching train; they were engrossed in their occupation, and conditions of wind and weather might be expected to prevent the engine whistle from attracting their attention. Since it is found as a fact that no one was so stationed to look out for and warn this body of workmen—there were some 30 or 40 of them in the different gangs—

we are satisfied that the second conclusion was a proper one."

In *Parker v. Cushman,* (C. C. A. 8 C.) 195, Fed. 715, 719, the court said:

"The test is not what ordinarily prudent showmen used. They might all be negligent. In *Hamilton v. Des Moines Valley Railroad Co.,* 36 Iowa, 31, a recovery was sought for injuries from projecting timbers, and it was sought to instruct the jury that if they were loaded as was usual and customary upon defendant's and all other railroads plaintiff could not recover. The court very wisely said:

" 'The instruction was properly refused for the obvious reason that habits of negligence on the part of defendant or other railroads will not relieve them from the consequence of their negligent acts. It can hardly be insisted that, if one is 'usually and commonly' negligent, he will escape liability for his acts, and that the usual and common delinquencies of others will have the effect to excuse him. If, because an act is usual and common, it ceases to be negligent, it follows that the sure way of escaping liability for injuries to persons and property, in cases of this character, would be to adopt a certain and uniform system of common negligence.' "

The doctrine stated in the last preceding quotation was reiterated and affirmed by the same court in *American Car & Foundry Co. v. Uss,* 211 Fed. 868.

In *Shearman & Redfield's Negligence* (6 Ed.) § 12a, the authors say::

"The custom of others engaged in the same pursuit, though generally admissible in evidence by either party as tending to show negligence or the contrary, is not conclusive. 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.'

And it has been held that evidence of the usual method of doing the particular business may be received without such evidence as is in general necessary to establish a custom."

The proofs are abundant, direct, and circumstantial, that the engine movement could not be seen nor heard by Huxoll. Employes stationed at the engines on the adjoining spot track neither saw nor heard the passage of engine No. 213. At Huxoll's left was Orton's locomotive. In front of him was the icy platform about the water crane that occupied all the clearance space between the two tracks. The enginemen and the one switchman on engine 213 testified they could not see as far as the leading end of the engine, and could not see the track ahead. It is submitted that a holding, in such conditions, that would relieve the master of all duties, and leave Huxoll to his fate, would be barbarous. The precedents cited make the issue of ordinary prudence, a question for the jury, and establish the doctrines stated in the head notes of this division of the brief.

VI.

There was proof "tending to show a connection" between the failure of the engine power brake and the injury and death of Huxoll, and laying a "foundation" for the conclusion that the failure of the power brake " contributed" to Huxoll's injury and death. That issue was rightly submitted by the trial court to the jury.

The proofs laying a foundation for the conclusion that the failure of the engine brake contributed to the injury and death of Huxoll, are cited in chapter II of this brief, *ante* pp. 54-59. The references made in this brief are in addition, and supplementary to those given in the brief of plaintiff in error at pages 59 to 71.

The argument of plaintiff in error that it was error to submit the issue of whether a failure of the brake contributed to Huxoll's injury or death, is based on the cases of *St. Louis, I. M. & T. Ry. v. McWhirter,* 229 U. S. 265, and *Patton v. Texas & P. R. Co.,* 179 U. S. 658. In *McWhirter's case,* the court determined the sufficiency of the case to sustain a charge of the violation of the hours of service act, by a consideration of whether there was any "proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident?" In *Patton's Case,* the testimony, according to the opinion, showed "that any one of half a dozen things may have brought about the injury" some of which involved the master's liability and some of which did not. The holding was that, in that state of the proofs, the jury could not

infer that the injury was caused by the master's negligence, "when there is no satisfactory foundation in the testimony for that conclusion."

In the case under review the answer admits that, in running its engine over Huxoll, defendant inflicted injuries upon his person from which he died on the day following the casualty. Assuming the failure and disability of the brake, in consequence of which there was a slow stop where a quick stop was required, is there any proof "tending to show a connection between the slow stop and any of the injuries, or, as stated by the statute, the injuries "in whole or in part?" Is there any "satisfactory foundation in the testimony" for the conclusion that the disability of the brake "contributed" to the injury or death? These inquiries present the precise tests of the cases cited, in so far as they can be made applicable to the terms of the Acts of Congress in question. It is submitted that the proofs, to which we have previously referred, when subjected to these tests, amply justify the submission of the issue to the jury.

The plaintiff's petition alleges (p. 4) that "defendant negligently and carelessly * * * backed an ordinary road locomotive engine * * * upon and over the said Fred J. Huxoll, and thereby inflicted grievous and fatal injuries upon his person, *from which, on the next following day, he died.*"

By the terms of the statute exemption from the defenses of contributory negligence and assumed risk results when the violation of a safety appliance regulation *contributes* to the *injury or death.*

The amendatory act of April 5, 1910, (8 U. S. Comp. St. An. § 8665), in force at the time of the casualty under consideration, provides that any right of action given by the Employers' Liability Act to a person suffering injury, "shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee," etc.

In *St. Louis, I. M. & S. R. Co. v. Craft,* 237, U. S. 648, this court held that, under the April 1910 amendment last cited, the administrator is entitled to recover for the conscious pain and suffering of the deceased in the time intervening between infliction of the injuries and his decease, and affirmed an award of $5,000 for this element of damages for conscious pain endured during a period limited to thirty minutes.

It was proved in *Huxoll's case* that there was a slow stop, and also that with the benefit of an efficient power brake, required by the safety appliance act, there could have been a quick and practically instantaneous stop. The needless distance traversed by the engine, after the engineer received the emergency stop signal, is directly connected up with the infliction of the injuries, and was necessarily a factor in producing both the injuries and death.

It was proved that when the engine finally came to a stop the left main driver was standing on Huxoll's right arm "at about the cuff of his glove." He was wedged under the brake-rigging and driver, in such a position that the engine could not be moved

without mangling him. The hold of the driver (which bore a ponderous weight) upon his arm, had, obviously, drawn his body into that position, and had torn his arm from his body at the socket of the shoulder joint. If the engine had proceeded further before coming to a full stop such serious mangling, and perhaps decapitation, would have occurred as to produce instant death.

The release of Huxoll required removal of the brakes, a process that consumed *forty-five minutes.* Huxoll was conscious, and able to sustain such conversation with the engineer, Orton, as "was necessary about getting him out." Two hours after his release, on his way to the Cheyenne hospital, Huxoll evinced consciousness by inquiring of Orton what had hit him. He survived the shock approximately one whole day. Record references to the proofs of all the facts above recited have been previously given. *Ante*, pp. 54-59.

It is submitted that the testimony mentioned lays a substantial foundation for the inference that the disabled safety appliance, and the consequent slow stop, *contributed* to both the injury and death of Fred Huxoll. That he was not instantly killed, and crushed and mangled beyond recognition, is due to the circumstance that the engine came to a full stop coincidently with the point of time at which the main driver obtained its hold upon the right arm, glove and storm coat. The unavoidable inference is that the body was free and the right arm intact, up to a point of time practically coincident with the bringing of the engine to a full stop.

There is a substantial foundation for the inference that if the engine had stopped quickly Huxoll would not have been imprisoned by the weight of the main driver on his arm, that his arm would not have been torn from his body, and that he would not have been imprisoned by the powerful hold of the driver and brake-rigging.

It is common and general knowledge that hemorrhage is a necessary attendant of an unprotected wound caused by the severance of an arm. It is common and general knowledge that the depressing effects of the shock of traumatic injuries are greatly aggravated by a material loss of the vital fluid, and that hemorrhage, alone, is a cause of death. We know such commonplace propositions to be true without resort to the expert knowledge of a pathologist. We know, also, as a matter of common knowledge, that merely prolonging a process of torture produces serious and even fatal consequences, and that "first aid," quickly given, is often indispensable to the preservation of life upon the receipt of traumatic injuries. It is a fair inference from the proofs that the severance of Huxoll's right arm, and the protracted period of his torture during the forty-five minutes consumed in removal of the brakes, were direct consequences of a slow stop, which an efficient power brake would have avoided. The proofs, therefore, satisfy the conditions of the statute, and make an issue for the determination of the jury.

If we assume, as we must, that the brake was disabled, then its disability, and the consequent slow

stop, are necessarily concurring factors in the infliction of the injuries. *There would be some battering of Huxoll's body* during every inch of the course over which he was pushed, from the place of the first impact of his person with the tender to the point where he was when the engine came to rest. Could his inert body be pushed over the ballast and ties by the appliances under the engine, *over any part of the full course traversed,* without the infliction of some injury upon his person? The statute does not place on plaintiff the burden of showing the quantum or particulars of the injuries attributable to the violation of a safety appliance regulation. It is satisfied by proof that personal injury resulted *in any part* from that cause. The statute does not place on plaintiff the onus of proving that non-observance of the safety appliance regulation is the dominant, efficient, sole or proximate cause of death. Its terms are satisfied by proof that such non-observance of the regulation *contributed, in any degree,* to the cause of death. We submit that this consideration ends all argument in favor of defendant in error, and that the proofs not only warranted, but imperiously demanded submission of the issue by the trial court. Any other course would have been in contempt of the governing statute.

The court did not submit the question of whether there would have been a collision, with some resulting injuries to the person, under the operating methods employed, if the power brake had been in working order. The question actually submitted was

whether failure of the brake, and the consequent slow stop, *contributed to the injury or death of Huxoll.* The argument of plaintiff in error assumes that some injury from being knocked down and pushed along the ties and ballast by the appliances under the engine, up to the point at which the engineer received a stop signal, was unavoidable. It is conceded that this is so. Because it is so, the infliction of some injuries during the last thirty feet of the distance traversed by the engine before it came to rest, was also unavoidable; and the failure of the brake, and the lengthening of the course traveled in coming to a stop were contributing factors in the injury and death of Huxoll. This aspect of the proofs meets, precisely, the terms of the statute, and justifies submission of the issue to the jury.

No circumstance is disclosed in the evidence to justify the inference that the "bad scalp wound" mentioned by Orton was of a fatal character or affected any vital function. The terms employed by the witness indicate to the contrary; and the circumstance that Huxoll was conscious during removal of the brakes, and two hours after his release, argues against the theory that the blow by which that wound was inflicted produced any brain lesions or any serious or profound concussion of the brain. The latter hypothesis would not be consistent with the functioning of the brain indicated by rational conversation.

The proposition stated in *Patton v. Texas & P. R. Co.*, 179 U. S. 658, and in *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, is that there must be a foundation in the testimony for an inference of

the master's negligence, and some proof to show a connection between the accident and the master's negligence. Otherwise the master's liability would be that of insurer, as is shown in the opinion in *McWhirter's case*. That rule cannot, however, be applied to overturn a verdict of a jury, unless there is a total failure of proofs, either to lay a foundation for an inference of negligence, or a connection of the casualty with such negligence. The opinions in both of the cases cited recognize this qualification; and other cases approve submission of the issues of fact, where any substantial foundation is laid in the proofs for such inferences. There is certainly no foundation in its decisions for the contention that this court has announced the rule invoked, without qualification, in a form that implies an invasion of the exclusive province of the jury. Its judgments show the contrary to be true.

In *Atlantic City R. Co. v. Parker*, 37 Sup. Ct. Rep. 69, it was said in the opinion by Mr. Justice HOLMES:

"No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to draw heads, and, further, the car was on a curve which, of course, would tend to throw the coupler out of line. But the jury were *warranted* in finding that the curve was so slight as not to affect the case, and in regarding the track as, *for this purpose*, a straight line. If couplers failed to couple automatically upon a straight track, it at least may be said that a jury would be *warranted* in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any ex-

planation believed by them, the failure *indicated* that the railroad had not complied with the law."

In *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, it is said:

"No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet, it can be avoided, if necessary, and when the particular and known condition of the train makes a sudden bump obviously dangerous to those known to be on the top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty."

It is submitted that this court should not say that a jury would not be warranted in finding that the lengthened course over which Huxoll was bumped, in the present case, over the ties and ballast, due to a slow stop where a quick stop was required, did not result in the infliction of some injuries upon his person which he would not have received if the course traversed in coming to a stop had been shortened. According to the cases cited, it is sufficient if an inference drawn by the jury is a reasonable deduction from the evidence adduced.

In *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 585, it was said in the opinion by Mr. Justice HARLAN:

"There was *fair ground* for difference of opinion, and the court's refusal to instruct the jury, *as a matter of law*, that the evidence established the defense of contributory negligence, was right."

In *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 32, it was said:

"The motion at the close of the plaintiff's evidence for a peremptory instruction for the company

was properly denied. It could not have been allowed without usurpation, upon the part of the court, of the functions of the jury. Where a cause fairly depends upon the *effect* or *weight* of testimony, it is one for the consideration and determination of the jury under proper directions as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion to set aside a verdict in opposition to it."

It is at least an admissible inference, upon the testimony to which reference has been made, that the lengthened course over which Huxoll was pushed and rolled, consequent upon the failure of the power brake, *contributed* to his injury and death. And if it be conceded, as must be done for the purpose of disposing of the point, that, failure of the brake occasioned a slow stop, then it is submitted that additional injuries, on account of the lengthened course required to make the stop, *were inevitable*. The request to withdraw the issue confesses every reasonable inference that may be drawn from the testimony. It would have been a manifest invasion of the exclusive province of the jury to withdraw the issue. The contention is, therefore, utterly destitute of merit.

VII.

No meritorious exceptions to instructions given or refused are presented by the plaintiff in error.

The argument presenting exceptions to the instructions given by the trial court to the jury, makes specific mention of only three of the twenty-nine paragraphs included in the charge. The exceptions urged, in the order mentioned in the brief, are to No. 13, specified at page 85 of the brief, No. 12, specified at page 87, and No. 16, specified at page 88. Each one of the three instructions to which an exception is urged, is so precise and academically accurate in the statement of the legal proposition which it embodies, as to defy just criticism of the substantive rule of law stated therein.

The proposition embodied in instruction 12 to which exception is taken is stated therein (printed record, p. 46,) as follows:

"If you find from the evidence that the death of Fred J. Huxoll resulted, in whole or in part, from the negligence of any of the officers, agents or employes of the defendant, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track roadbed, or other equipment, alleged or charged in the petition, *and* that the power brake of defendant's road engine No. 213 was not, at the time of the accident, in working order and could not be used by the engineer of such locomotive to control its speed, *and* the fact that such power brake was not in working order and could not be used by the engineer to control the speed of the engine, *contributed* to the death of Fred J. Huxoll, *then* the law is that the deceased, Fred J. Huxoll,

cannot be held either to have been guilty of contributory negligence or to have assumed the risks of his employment."

The elimination of contributory negligence and assumption of risk was thus made to depend upon a finding of the three concurring facts (1) of negligence, (2) disability of the engine power brake, and (3) that the disability of the power brake contributed to the death. That this was a precise and technical application of the letter and spirit of the statute, is obvious.

Instruction No. 16, to which exception is taken, is as follows (printed record, p. 47):

"The law is that a servant, by his contract of employment, assumes the ordinary risks and dangers incident to his employment, but in this case the deceased, Fred J. Huxoll, cannot be held to have assumed the risks of his employment *if you find* that the power driving wheel brake on defendant's engine No. 213, with which he collided, was not, *at the time of the accident*, in working condition, *and* that fact contributed to his death. The ordinary risks and dangers of a servant's employment, assumed by him as a matter of law, do not include risks and dangers due to the master's negligence, *unless* such risks and dangers are actually known to the servant *or* are open and obvious."

While the trial judge very properly embraced in his charge a statement of the general doctrine of the servant's assumption of the risks incident to his employment, the decisions of this court in *Texas & P. R. Co. v. Archibald*, 170 U. S. 665 (per Mr. Chief Justice), and *Texas & P. R. Co. v. Behymer*, 189 U. S. 468 (per Mr. Justice Holmes), forced upon him

a statement of the qualification that risks due to the master's negligence, are not assumed, *unless* open and obvious, *or* actually known to the servant. The Act of Congress forced upon the trial judge a statement of the further qualification that where the violation of a safety appliance regulation *contributes* to the injury or death, the doctrine of assumed risk is eliminated. The instruction complained of covered, technically and precisely, the *general proposition,* and the two necessary *qualifications.* Neither qualification could have been omitted without disregarding, in the one case, the decisions of this court, above cited, or, in the other, the plain and mandatory terms of the Act of Congress.

At page 94 of its brief plaintiff in error offers the following general criticism of the instructions above quoted:

"The court by the above instructions also *took away* the defense of assumption of risk, which should have been, to say the least, submitted to the jury."

The criticism taxes patience. The quoted instructions, on their face, carry a submission of the issue to the jury, in words so apt and accurate as to defy just criticism.

The proposition embodied in instruction 13 (printed record, p. 46), to which exception is taken, is as follows:

"If you find from the evidence that it was the custom of defendant railroad company, at the time, to have a man stationed on the foot board of the leading end of the engine or cars as a lookout, *and* that the defendant was guilty of negligence in failing to so station a man as a lookout, *and* that the death

of Fred J. Huxoll resulted, in whole *or in part*, from such negligence, then the plaintiff would be entitled to recover in this action."

The criticism of the last quoted instruction is that the proofs do not justify the submission of the issue. But Conductor *Fletcher*, as heretofore pointed out, exercised the precaution of twice *flagging* through the identical conditions at the point of the casualty on the very day of the Huxoll casualty. (Printed record, p. 165) From Fletcher's deposition the following questions and answers were read (p. 166): "Q. You may state whether or not the precautions which you took in going through the steam and storm at this time in the Sidney yards were the usual precautions taken by the Union Pacific employes? A. Well, the instructions, I can't say what other people do. Q. Were these ordinary precautions which you observed, in going through places like that? A. Yes sir." And in the testimony of Matthews appears the following questions and answers: "Q. Now you may tell the jury what that custom was on that day in the particular of a switchman or *lookout* on the footboard, Mr. Matthews. A. The custom is to have a switchman on the front end of the engine in the direction it is going. * * * (p. 188) Q. Now what was the general practice and custom in reference to flagging through smoke and steam which was sufficiently dense to obscure the engineer's view of the track ahead? A. The custom was to stop and send a flagman ahead."

The proofs covered many aspects of operating customs and available means of avoiding trouble in

the special operating conditions present at the time of the casualty. An operating rule required the carrying of a "white" light or lantern at the rear end of a yard engine in day time, when conditions obscured day signals. A white light might have been seen in the darkness by Huxoll; or a man stationed in front would have been available as a flagman, if the engine was moving only three miles per hour. The extra hazards did not justify dispensing with ordinary precautions. They called for increased vigilance, and it was for the jury to say, upon the ample testimony adduced, whether the injury or death of Huxoll resulted, in any part, from negligence in failing to employ the precaution mentioned in the instruction. It was left to the jury to determine whether the admitted absence of the switchman was negligence, and this was obviously a correct disposition of an issue tendered by both the pleading and proof.

Paragraph 14 of the charge submitted the issues of whether the conditions required the engine to be kept under control, and the employment of extra precautions when the track was obscured by smoke and steam. While no exception is urged to instruction No. 14, it covered the issues concerning the propriety of blind engine movements, and flagging through places where the track could not be seen by the engineer. It may be that the trial court gave too narrow a limitation to the functions of the jury upon all of these questions, including that presented by instruction No. 13.

Plaintiff adduced proofs (1) of the common method of stationing a lookout on the leading end in yard movements, (2) of the necessity of extra precautions in moving where the track cannot be seen, (3) that the specific engine movement responsible for the casualty was a blind one, that is, that none of the crew could see the track ahead, nor discover the presence of an obstruction except by the impact of a collision, and (4) that there were recognized, practical methods, known to the members of the switch and engine crews, of avoiding the risk of moving blindly.

The jury was not concluded by common and usual methods of operation. It was privileged to consider the extraordinary operating conditions, the fact that the engine was moving in a place where the track could not be seen, the practical and known methods of operation available in yard movements, so far as disclosed by the evidence, of avoiding the extreme risks of blind movements, and any inherent dangers in the methods actually pursued. Upon a consideration of those elements, it was for the jury to determine, whether ordinary care, in the operating conditions shown, required a switchman on the leading end, or a flagman on the ground, and whether the injury to Huxoll was, in any part due to the failure to so station a man. It is submitted that it was for the jury to say whether ordinary prudence would permit any engine movement close by the water crane and spot track, at a time when two engine crews and a train crew were ordered to go to that

point and when no part of the track ahead was visible, unless the leading end was provided with a light, and a flagman was sent ahead on the ground, when those expedients were shown to be available and practical. It was the exclusive province of the jury to say what precautions were required by ordinary prudence, in conditions of known peril. That is the doctrine firmly settled by the well considered judments of this court. *(Grand Trunk R. Co. v. Ives,* 144 U. S. 408; *Texas & P. R. Co. v. Behymer,* 189 U. S. 468; *Wabash R. Co. v. McDaniels,* 107 U. S. 454; *Fletcher v. Baltimore & P. R. Co.,* 168 U. S. 135.)

In so far as the instructions tended to narrow and restrict the functions of the jury, and to limit their inquiry to proven customs of operation, they merely added to the plaintiff's burden, and deprived the plaintiff of the benefit of the established rule last above stated. In that behalf, the instructions were more favorable to the defendant, than a strict application of the governing law would warrant. Such a departure from the strict letter of the law affords no ground of complaint to the losing suitor. "Error affords no ground for reversal, where it is not prejudicial. * * * Of course, no prejudice could have resulted to the company from the instructions being more faborable to it than they should have been under the controlling law." Per Mr. Justice VANDEVANTER, in *Chicago, R. I. & P. R. Co. v. Wright,* 239, U. S. 548, 552.

The intsructions given may not be condemned by mere faults assigned to the reasons given in the

opinion of the State Supreme Court for their approval. The record presents the question of whether the judgment of the district court was rightly affirmed. The correct doctrine, in that behalf, is precisely stated at page 89 of the brief of plaintiff in error as follows:

"It is immaterial whether the interpretation placed on the act by the Nebraska Supreme Court is correct, or not, *because the jury had the instruction,* and not the Act of Congress for its guidance, and the *instruction* expressly tells the jury" what the law is.

It is likewise immaterial whether *the effect of the evidence* is correctly stated by the appellate court, because the evidence in the record was all before the jury. The evidence cited herein, justifying the trial court in submitting the issues, and amply supporting the finding of the jury, was all before the trial court and jury. We do not question the propriety of reference to the opinion of the State Supreme court, nor the propriety of obtaining any assistance derivable from any analysis of the evidence contained therein; but ultimately, the merit of the proceedings had before the trial court must be judged by the record made in that court. The conclusive answer to the many criticisms of the opinion of the State Supreme Court is, therefore, the record references demonstrating the sufficiency of the evidence to require submission of the issues which the instructions presented to the jury. Judgments are not reversed because erroneous reasons are assigned for a right conclusion.

Concerning the contention that the charge did not make any mention that non-observance of operating methods intended to avoid train collisions would not involve a breach of duty to Huxoll, or as stated in the brief, "would not be negligence as to Huxoll," attention is directed to paragraph 17 of the charge (p. 48) as follows:

"You are instructed that you cannot base a verdict against the defendant in this case on the violation of any rule or custom requiring *signals* to be given or *precautions* to be taken by a switch engine, in order to avoid collision with other engines or cars or trains, as a violation of such rules or customs *would not be negligence toward such deceased.*"

Whether right or wrong, the above was given in the identical words of instruction No. 20 requested by plaintiff in error (p. 31). It was a ruling in favor of and not adverse to plaintiff in error. While the proposition is, on the evidence, erroneous and prejudicial to defendant in error, the plaintiff in error had the benefit at the trial of the rule for which it contends.

By instruction 6 (p. 44) the jury was directed that "the mere fact that an accident occurs is not sufficient to create a liability." By instruction 18 (p. 48) the jury was warned that negligence could not be inferred from the mere fact that the engine ran over Huxoll. No. 18 given by the court is in the words of defendant's request No. 27 (p. 33). This was the only point requested which contained a warning that the master was not an insurer.

Instruction 19, given, is identical with No. 29, requested by defendant, and is as follows:

"The jury are further instructed that if you find from the evidence that the defendant was not negligent, or that the said Fred J. Huxoll received the injuries which resulted in his heath without any negligence on the part of the defendant, or that the injuries received that resulted in his death were the result solely of his own negligence, and that his own negligence was the proximate cause of his death, then you will return a verdict finding for defendant."

When the instructions given are thus read together, as they must be, it is obvious that the charge covers all that the law requires in cautions against inferring liability or negligence from the mere fact of the casualty, lays the burden of proof on plaintiff, and properly submits the issues of negligence, contributory negligence and assumed risk. Every departure from approved rules is in favor of and not adverse to plaintiff in error.

The exceptions urged to refusal of instructions requested by defendant are, professedly, but restatements of the contentions urged against the sufficiency of the evidence. They but challenge attention to exceptions to the sufficiency of the evidence upon specific issues, by requests for their peremptory withdrawal from the consideration of the jury. This is evident by their submission upon the following very general statement (Brief Plaintiff in Error, p. 96):

"What we have said in support of our contention that the court erred in refusing to instruct a verdict for defendant, applies to each of the above errors, and it is not necessary to repeat what we have already said. We submit, however, that if plaintiff

failed to prove either or all of the above alleged acts of negligence covered by these instructions, then the jury should have been instructed as requested; that is, we contend that it was error to submit to the jury any issue which was not supported by the evidence, and the court should have taken each of the issues covered by the above instructions from the jury, and it was reversible error for it to refuse to give either or all of the instructions requested."

Of the 47 requested instructions errors are urged by this general statement to refusal of numbers 14 (Record p. 30), 47 (Record p. 39), 22 (Record p. 32), 6 (Record p. 26), 17 (Record p. 31), and 15 (Record p. 30).

Numbers 14, 47 and 22 requested withdrawal of the issue of negligence based on the admitted failure to station a switchman on the leading end of the engine. The argument justifying paragraph 13 of the charge, contained in this chapter, is a justification of the refusal to give the three requested instructions. It would be wholly inadmissible to withdraw that issue on the ground suggested that *defendant's purpose* in adhering to the practice of having a man ride the leading end must have been to warn those upon the track of the presence of danger. The defendant may not thus force upon the jury the adoption of its own standard of what constitutes ordinary prudence. It was enough to show that the practice in question was well known and available in yard operations, and to prove that the unusual operating conditions required extra precautions. The question of whether ordinary prudence required the man to be so stationed became, upon such proofs, a question exclusively for the jury.

Numbers 6 and 17 so refused, requested withdrawal of the issue of whether the failure of the engine power brake contributed to Huxoll's injury or death. The proofs justifying submission of that issue are set forth in Chapter II of this brief, *ante* pp. 54-59, and an argument sustaining the submission is found in Chapter VI, *ante* pp. 97-106.

Number 15 so refused, requested the withdrawal of all inquiry into the question of the speed of the engine "even though you should find that said engine was in fact being operated at a high and dangerous rate of speed." The proposition is, on its face, unsound.

VIII.

Engine No. 213, whose movement resulted in the injury and death of Huxoll, was employed in interstate commerce.

The proofs showed that the engine, immediately before being assigned to the switching service, had pulled a freight train between Cheyenne, Wyoming, and Sidney, Nebraska. At the time of the casualty it was being used in the general switching service, at a division point of an interstate railroad, breaking up interstate trains and taking cars to their appropriate tracks for making up outgoing trains carrying interstate shipments. The charge that it was required to be equipped with a driving wheel power brake was, therefore, justified by *St. Louis, S. F. & T. R. Co. v. Seale,* 229 U. S. 156.

It is submitted that none of the contentions urged by plaintiff in error have any just basis or foundation in the record. The trial was free from error, and the judgment of affirmance pronounced by the Nebraska Supreme Court was correct. That judgment should, in turn, be affirmed by this Court.

Respectfully submitted,

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Counsel for Defendant in Error.

a very short distance. *Held*, that deceased was guilty of contributory negligence.

Under the Federal Employers' Liability and Safety Appliance Acts, contributory negligence avails the carrier neither as a defense nor in diminishing damages, if its failure to observe the latter act by having the power-brake of its locomotive in working order contributed in whole or in part to cause the death of the employee.

Upon the conflict of testimony introduced, considered in the aspect least favorable to the plaintiff in error, *held*, that it was not error to submit the case to the jury on the question whether the defective condition of the power-brake contributed, in whole or in part, to cause the fatal result.

99 Nebraska, 170, affirmed.

THE case is stated in the opinion.

Mr. N. H. Loomis and *Mr. C. A. Magaw* for plaintiff in error.

Mr. Halleck F. Rose, with whom *Mr. Walter V. Hoagland*, *Mr. Wilmer B. Comstock*, *Mr. John F. Stout* and *Mr. Arthur R. Wells*, were on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

Fred J. Huxoll, a locomotive engineer in the employ of the plaintiff in error, was run down by a switching engine, about 11 o'clock in the morning, in a switching yard of the company at a division point in Nebraska, and subsequently died of the injuries which he received.

The weather was very cold, with a high wind blowing and a cloud of steam and smoke, from engines standing nearby the scene of the accident and from a round-house farther away, had settled down upon the tracks, and it was while passing through this that the deceased was struck by the engine. This cloud of steam and smoke is described by one witness as extending 300 or 400 feet along

the tracks, and by another for about 100 to 200 feet. It varied in density and shifted with the wind, so that at times one could see considerable distances through it while at other times it was so dense that it was possible to see only a very short distance. Huxoll was walking eastward through this cloud of smoke and steam and was between the rails of one of the tracks when an engine backing toward the west struck him in such a manner that the tender passed over him, and when the engine was stopped he was opposite the main driving wheel, with his right wrist under the wheel on the rail.

Judgment was rendered by the trial court on a verdict in favor of the plaintiff, which was affirmed by the Supreme Court of Nebraska and, the case being one to which the Federal Employers' Liability Act is applicable, it is now here on writ of error.

There are many claims of negligence in the petition, but the court submitted only three of them to the jury, and of these we need consider but one instruction, viz:

Was the power brake on the engine in working order at the time of the accident, and if it was not, did this defect contribute "in whole or in part" to cause the death of Huxoll?

The oral argument of counsel for the plaintiff in error was practically confined to the proposition that the trial court committed reversible error in submitting these questions to the jury, for the reason that, even if it be assumed (as it must be for there is sharp conflict on the point) that the power brake was not in working order, there was no substantial evidence in the case that this failure contributed "in whole or in part" to cause the death of Huxoll.

The engineer did not see the deceased at the moment he was struck, and it is argued that there is no substantial evidence to show how much farther the engine ran after he was notified of the accident than it would have run if the power brake had been properly applied, or that

the running of the engine such distance, whatever it may have been, added anything to the injuries of the deceased and so contributed to cause his death.

It is necessary for us to examine the evidence in the record to determine the validity of this claim for the reason that it presents a federal question, not of fact but of law, (*Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673), and it relates to the only negligence claimed in the case which, if proved, would relieve the defendant in error, as the charge of the court in the instruction we are considering relieved her, from the necessity of having her recovery diminished by the jury in proportion to the amount of negligence attributable to her decedent, who was obviously guilty of contributory negligence in walking on the track under the conditions shown.

The Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, is confessedly applicable to the case and the rule of liability prescribed by this and the Safety Appliance Act of March 2, 1893, 27 Stat. 531, is, as the trial court charged, that if the failure to have the power brake in working order contributed "in whole or in part" to cause the death of deceased, the plaintiff in error would be liable in damages and neither contributory negligence nor assumption of risk could avail the company as a defense or in diminishing the damages.

There is conflict in the evidence; as to the speed at which the engine was moving when it entered the cloud of steam and smoke—the estimates vary from three miles to ten miles an hour; as to the distance within which the engine with the power brake properly working could have been stopped under the conditions which existed at the time of the accident,—the estimates vary from "almost instantly"—eight to ten feet,—to forty feet; as to when the engineer received notice that the deceased had been struck—the statements vary, from almost the instant the

man was struck, to considerably later; as to the distance which the engine ran after striking the deceased—the estimates vary from thirty to about one hundred and thirty-five feet; as to the distance which the engine ran after the engineer had notice of the accident—the engineer testified at one time that he thought it did not exceed forty feet, while other testimony tended to show that it must have been considerably more than a hundred feet; and as to the lookout which the engineer was keeping when the accident occurred.

The first wheel to actually strike the deceased was the "main" driving wheel—the middle one of three—and this was standing on his right wrist when the engine was stopped, so that the entire tender and quite one-half of the engine proper, including the fire-box, passed over his body which was found so wedged beneath the engine that it was necessary to remove the brakerods to release him.

The deceased was not instantly killed but was conscious and talked some during the forty-five minutes which elapsed before he was released from under the engine and also later in the day while on the way to the hospital at Cheyenne, and he did not die until two o'clock the next morning. The injuries which caused his death are not described beyond the bare statement that the driving wheel rested on the wrist of his right arm, that that arm was found afterwards to be torn from the shoulder and that his scalp was badly cut.

Considering this conflicting testimony in the aspect of it least favorable to the company, as we must on this review, it results that there is evidence tending to show, that, while the engineer did not see the man struck, he was notified almost instantly by a call to stop from the one witness who says he saw him struck, and that if the power-brake had been working the engineer could have stopped his engine, running three or four miles an hour, "almost instantly,"—"in eight to ten feet," but that in fact it

ran for approximately one hundred and thirty-five feet after striking the deceased, with his body under the tender or engine almost the entire time.

Demonstration is not required in such a case as we have here but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence, and it is impossible for us to conclude that the conflict which we have thus described does not present evidence sufficient to justify the submitting of the case to the jury for its determination as to whether the deceased, who survived the accident for fifteen hours, received injuries which contributed in part, at least, to the fatal result, during the time that the engine was being negligently run for a distance which there is evidence tending to show was at least one hundred feet, with his body all the time being dragged and crushed between the frozen ballast of the track, the low-hanging attachments of the tender and the rods of the driving wheel brakes with which his body was found so entangled that it required forty-five minutes to release him from his desperate situation. It is significant that the men who were there, with all of the conditions before their eyes, thought that further movement, even the slightest, of the engine, would result in further injury to the deceased and that, for this reason, they would not permit it to be moved at all, but thought it necessary to remove the brakerods in order to release him, even though this required that he be exposed to the cold in much below zero weather for forty-five minutes.

The judgment of the Supreme Court of Nebraska must be

Affirmed.

UNION PACIFIC RAILROAD COMPANY *v.* HUXOLL, ADMINISTRATRIX OF HUXOLL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 104. Argued December 21, 1917.—Decided January 21, 1918.

The question whether any substantial evidence was introduced to justify submission of a case to the jury on the issue of proximate causal negligence is one of law, reviewable by this court, in an action under the Federal Employers' Liability Act, coming from a state court.

A railroad employee was run down and killed in a switching yard by a switching engine, backing on a track, between the rails of which he was walking in the opposite direction. He was passing through an extensive cloud of steam and smoke coming from a round-house and nearby engines, which had settled upon the tracks on a very cold and windy day. The cloud was dense but shifting, so that at times one might see through it considerable distances, and at others but